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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91194974
Party	Plaintiff Promark Brands Inc. and H.J. Heinz Company
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

PROMARK BRANDS INC. and  
H. J. HEINZ COMPANY,

Opposers,

vs.

GFA BRANDS, INC.,

Applicant.

**Opposition No. 91194974 (Parent)  
and Opposition No. 91196358**

U.S. Trademark Application 77/864,305  
For the Mark **SMART BALANCE**

U.S. Trademark Application 77/864,268  
For the Mark **SMART BALANCE**

**OPPOSERS' THIRD NOTICE OF RELIANCE**

Pursuant to Rule 2.120(j)(1) of the Trademark Rules of Practice and Section 704.09 of the Trademark Trial and Appeal Board Manual of Procedure, Opposers, ProMark Brands Inc. and H. J. Heinz Company, hereby submit, make of record in connection with this opposition proceeding, and notify Applicant of Opposers' reliance upon the April 24, 2012 discovery deposition and accompanying exhibits of Dr. Leon B. Kaplan, who testified as an expert witness on behalf of Applicant GFA Brands, Inc.

A true and correct copy of the discovery deposition is attached hereto as Exhibit D, and a true and correct copy of the accompanying exhibits are attached collectively hereto as Exhibit E.

Dated this 12th day of March, 2013.

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**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing was sent by FedEx Express mail, postage prepaid, on this 12th day of March, 2013, to Counsel for Applicant:

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# **EXHIBIT D**

**In The Matter Of:**

***PROMARK BRANDS INC., ET AL.***

***v.***

***GFA BRANDS, INC.***

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***LEON B. KAPLAN, PH. D. - Vol. I***

***April 24, 2012***

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**MERRILL LAD**

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

\_\_\_\_\_  
X

PROMARK BRANDS INC. and  
H.J. HEINZ COMPANY,

Opposers,

-against-

Opposition Nos. 91194974

GFA BRANDS, INC.,

and 91196358

Applicant.

\_\_\_\_\_  
X

April 24, 2012  
9:25 a.m.

Deposition of LEON B. KAPLAN, PH. D., taken by  
Opponents, pursuant to Notice, at the offices of Jones Day  
222 East 41st Street, New York, New York, before Denise L.  
Daniels, a Shorthand Reporter and Notary Public within and  
for the State of New York.

Job No.: 24-216170

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I N D E X

WITNESS	EXAMINATION BY	PAGE
Leon B. Kaplan, Ph. D.	Ms. Dickson	5

E X H I B I T S

KAPLAN FOR IDENTIFICATION	PAGE
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Exhibit 1	Document entitled "Critique of Likelihood of Brand Confusion Between Smart Ones and Smart Balance Resulting from the Introduction of Smart Balance Frozen Meals"	5
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1  
2 IT IS HEREBY STIPULATED AND AGREED by and  
3 between the attorneys for the respective parties  
4 hereto that the sealing and filing of the within  
5 deposition be, and the same hereby are, waived; and  
6 that the transcript may be signed before any Notary  
7 Public with the same force and effect as if  
8 signed before the Court.

9 IT IS FURTHER STIPULATED AND AGREED that all  
10 objections, except as to the form of the question,  
11 shall be reserved to the time of trial.  
12  
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17  
18  
19  
20  
21  
22  
23  
24  
25

1 LEON B. KAPLAN, PH. D.

2 business address, 12 Roszel Road, Suite C-103,  
3 Princeton, New Jersey 08540, having been first duly  
4 sworn by the Notary Public (Denise L. Daniels), was  
5 examined and testified as follows:

6 MS. DICKSON: Mark these as Kaplan 1 and  
7 Kaplan 2.

8 (Document entitled "Critique of Likelihood of  
9 Brand Confusion Between Smart Ones and Smart  
10 Balance Resulting from the Introduction of Smart  
11 Balance Frozen Meals" marked Kaplan Exhibit 1 for  
12 identification, as of this date.)

13 (Dr. Sabol's report marked Kaplan Exhibit 2  
14 for identification, as of this date.)

15 EXAMINATION BY MS. DICKSON:

16 Q Good morning, Dr. Kaplan.

17 A Good morning.

18 Q I'm going to hand you what we marked as Kaplan  
19 Exhibit 1.

20 A Thank you.

21 Q Are you the Leon B. Kaplan, Ph.D who submitted  
22 Kaplan 1, entitled "Critique of Likelihood of Brand  
23 Confusion Between Smart Ones and Smart Balance Resulting  
24 from the Introduction of Smart Balance Frozen Meals," in  
25 this opposition proceeding?

1 A Yes.

2 Q Dr. Kaplan, how do you define what a brand is?

3 A A brand is a product or a service from  
4 a company that it ties a name to.

5 Q Does it have to be a name or can it be  
6 something else?

7 A It could be something else.

8 Q What kinds of something else could it be?

9 A It could be a unique look or probably  
10 some kind of unique symbol. Ideally it would be  
11 unique.

12 Q I'm going to ask you this. What does the term  
13 "brand strength" mean?

14 A I think the term "brand strength" is  
15 used to refer to the degree to which consumers  
16 or the public either have awareness of a brand  
17 or have some understanding about a brand.

18 Q How do you measure, go about determining a  
19 brand strength?

20 A There are a multitude of ways that you  
21 can do that. You can ask consumers, you can  
22 make an inference from the longevity of a brand,  
23 the kinds of resources the company that owns the  
24 brand have put behind the brand in advertising,  
25 promotion, marketing.



1 Q Is it fair to say there are a variety of  
2 different disciplines that can be implemented or used to  
3 assess a brand strength?

4 A Yes.

5 Q You have a Ph.D in consumer industrial  
6 psychology, correct?

7 A Yes.

8 Q Are you a lawyer?

9 A No.

10 Q If someone had a degree or expertise in  
11 statistics, could they measure a brand strength?

12 MR. CROSS: Objection to form.

13 A Not necessarily.

14 Q Okay. Why do you say "not necessarily"?

15 A Well, statistics is a process, and  
16 brand strength and the measurement of it both  
17 deals with a body of knowledge, marketing, let's  
18 say in this instance, and a process of  
19 measurement.

20 Now, if someone has a degree in statistics, it  
21 might be in biostatistics, and they could tell you a  
22 great deal about epidemics, but not a whole lot about  
23 brand strength.

24 Q What about someone with a marketing  
25 background, could they provide information on brand

1 strength?

2 A Well, they would know about a brand,  
3 and they certainly could offer opinions about  
4 the strength of a brand.

5 Q How about an economist?

6 A I hate to complicate this. It's the  
7 kind of economist. There are economists that  
8 work in the consumer area, there are economists  
9 that specialize in macro economics, and they  
10 could tell you whether the country is going down  
11 the tubes or not but probably not much about  
12 brand strength.

13 Q I guess what I'm getting at, you would agree  
14 with me, there are a variety of disciplines that someone  
15 could have as their specialty and could, depending on  
16 what specific areas in their specialty they practice and  
17 could provide information on brand strength?

18 A I would agree with that.

19 I will also say you can come to the knowledge  
20 about brand strength independent of your discipline but  
21 based upon your work experience and your life  
22 experience. See, we could have saved a lot of time if I  
23 just started with that.

24 Q Would you agree with me each of these  
25 specialties could have their own lingo or their own way

1 of conducting a study on brand strength?

2 A Yes.

3 Q Each specialty would have their own way of  
4 conducting a study on the likelihood of confusion?

5 A Now we're getting into the legal part  
6 of the whole thing. As a nonlawyer, but a  
7 research person, I don't think you have that  
8 much latitude with regard to likelihood of  
9 confusion. It is -- as I have come to learn of  
10 it and read about it, it's pretty well-defined  
11 by statute and cases. So I think there's a  
12 pretty general -- there's a -- I think there's a  
13 consensus about acceptability, about defining  
14 it, to get back to your question.

15 Q About defining likelihood of confusion?

16 A Yes.

17 Q Would you agree there are a range of indicia  
18 that could be probative of likelihood of confusion that  
19 different studies could provide?

20 A Sure, yes, I would.

21 Q And that could vary, depending on the  
22 discipline of the person conducting the study or  
23 providing the opinion?

24 A On a lot of things.

25 Q When you're asked to assess likelihood of

1 confusion, you often engage in a survey, correct?

2 A More than often.

3 Q Pretty much every time, would you say?

4 A If given the opportunity, it seems to  
5 me the intelligent way to go.

6 Q How do you go about setting up a survey?

7 A You speak with the client and you find  
8 out what the business question or the legal  
9 question -- you find out what it is you're  
10 supposed to survey. And that helps you define  
11 in a broad sense what you're doing.

12 And then through further discussion and  
13 investigation, you address the issue of who it is we  
14 should be surveying and what kinds of questions we need  
15 to answer.

16 Actually, I typically start after my initial  
17 discussions, and we have an idea of what the question  
18 is. I tend to start from the end and work backwards so  
19 I don't lose sight of where we want to be when we're  
20 done. But you would define who it is, the questions --  
21 who it is we want to interview, which is the universe.  
22 The questions that we should consider to answer -- let  
23 me back up.

24 We should decide how we will operationalize  
25 the whole issue, which is to say the questions that we

1 are going to -- the method of inquiry that we're going  
2 to use, how best to get that information by a telephone  
3 survey or a mall intercept survey, et cetera. And the  
4 kinds of questions that will provide us with the answers  
5 and, of course, the overall design of the survey. Those  
6 kinds of considerations.

7 Q When you say you start at the end and work  
8 backwards, does that mean you start with the questions  
9 and then work back toward defining the universe?

10 A That means -- let's stay with the  
11 likelihood of confusion question issue. At the  
12 end of the process, if done correctly, properly,  
13 then I should be in a position to provide a  
14 report that will say we found such and such  
15 level of confusion, with a lot of elaborations  
16 on among who and how we accounted for a variety  
17 of things and what the criteria were to  
18 establish that there was confusion, et cetera.  
19 It's like the North Star, I guess. When you're  
20 piloting a ship, you want to make sure that it's  
21 in front of you because you can get lost in some  
22 of the details and find you've gone on a  
23 tangent. That's why I try to do it. Some  
24 others work differently.

25 Q From your description, would you agree with me

1 that there are many different ways that you could  
2 approach a survey if you were going to establish  
3 likelihood of confusion?

4 MR. CROSS: Objection to form.

5 A Sure.

6 Q And different surveys will have different  
7 value as indicators of likelihood of confusion based on  
8 some of the choices that you make in structuring the  
9 survey?

10 A Could you clarify what you mean by  
11 "value"? It could mean several different  
12 things, different indicator or different  
13 accuracy.

14 Q Depending on the choices that you make in  
15 structuring your survey, the outcome could demonstrate  
16 likelihood of confusion for maybe a smaller population  
17 or larger population?

18 A Sure. Absolutely.

19 Q And that, depending on the population  
20 definition, for example, may have a different value in  
21 showing overall likelihood of confusion?

22 A That qualifies the likelihood of  
23 confusion as among -- as in the likelihood of  
24 confusion among such and such group.

25 Q So, depending on the choices you make, a

1 conclusion that likelihood of confusion exists could be  
2 subject to criticism?

3 A Of course. Of course.

4 Q But it's not necessarily a black and white  
5 issue, right?

6 MR. CROSS: Objection to form.

7 A In a research -- at least in research  
8 in this area, very little is black and white.  
9 There are -- you know, it's like in -- I think  
10 most things in life, there's a continuum. There  
11 are certain rules that are pretty hard and fast.  
12 In other situations, you make choices, and  
13 depending on the underlying question that's  
14 asked and sort of the generally accepted  
15 principles, you're located somewhere on the  
16 continuum, you know, better or worse, stronger  
17 or weaker or of greater or lesser value.

18 Q Would you agree with me there's no such thing  
19 as a perfect survey?

20 A There are times when I think I'm  
21 really close, but I would have to agree with  
22 you.

23 Q So, in the case where you have a near perfect  
24 survey and you would look at it maybe six months down  
25 the road, you might think of something else you could

1 have done that would make it even -- I don't want to say  
2 more perfect, but would be even more revealing in the  
3 data you're trying to achieve?

4 A You don't have to wait six months.  
5 Usually it's the day after I start gathering  
6 data. Sometimes that does -- that's always a  
7 possibility.

8 Q And that doesn't mean that your first survey,  
9 the near perfect survey is valueless because there is  
10 something else you could have done?

11 A There was never an issue of valueless.

12 Q What role do confidence levels play in surveys  
13 in determining what the value of the conclusion of the  
14 survey is?

15 A Well, that depends on whether you're  
16 talking to a marketing researcher or  
17 statistician. If you're talking to a  
18 statistician, he or she would say in all  
19 likelihood that if you don't have a truly random  
20 probability sample, then confidence intervals  
21 have no value, have no place in a survey.

22 The rest of us, generally speaking, use them  
23 as a guideline of some sort. A confidence level or  
24 confidence interval will tell you that if this were a  
25 true probability sample, the estimate or value that your



1 survey comes up with, which is a point like 6.5 percent  
2 has a margin of error around it, which is due to, just  
3 statistically speaking, a variety of things, which I  
4 won't go into. So the confidence interval would tell  
5 you, everything else equal, something about how much  
6 confidence you should have in the point estimate.

7 Q Aside from reporting a margin of error or  
8 confidence interval, would you agree that the other way  
9 that you control for errors is in the way that you  
10 structure the survey in the first place?

11 A The confidence interval -- if I may,  
12 the confidence interval does not control for  
13 error at all. It just tells you if this point  
14 estimate is right -- it just tells you this  
15 point estimate, and you could get that point  
16 estimate by rolling dice 250 times and recording  
17 the number and saying -- taking the average and  
18 saying that's the likelihood of confusion  
19 percentage, and then based on the number of  
20 times I roll the dice and where it is, I can  
21 have a confidence interval.

22 So it is merely a statistic that tells you  
23 something about how much confidence one should place in  
24 the number. It's different from controlling for error.  
25 If I make myself clear.

1           Q     What other ways do you control for error when  
2     you're conducting a survey?

3           A     When you're conducting a survey --  
4     well, let's back up. Error, which we will call,  
5     for argument's sake, noise, is pretty much  
6     inherent in the process of trying to get  
7     information from human beings, and in whatever  
8     way we choose to get that information, error can  
9     be introduced into any study by a variety of  
10    factors. The wording of the question, where the  
11    critical question or questions appear in an  
12    interview if we do an interview, how my  
13    respondents are selected, whether somehow  
14    whether there was some bias in that process,  
15    randomness of -- I can ask a person the same  
16    question today and I can ask you that question  
17    tomorrow and you might have a slightly different  
18    opinion.

19               And in the aggregate, that change could move  
20    the value I get or if I have enough people and they're  
21    all changing opinions, hopefully they'll cancel each  
22    other out.

23               So we talked about the way I word the  
24    question, where the question is and the method I use.  
25    My people, how they appear, and also it's almost in the

1 kind of information.

2 If I asked you about the first names of your  
3 parents, I'm likely to get the same answer later today,  
4 tomorrow or whenever. So there's very little error,  
5 that is a highly reliable answer. And if I asked you  
6 your feeling about the long-term potential for  
7 associates in law firms, that might change by year,  
8 month, day, hour, whatever.

9 Q Minute?

10 A You tell me.

11 So, stuff of that nature, okay, without taking  
12 up too much time.

13 Q Using an example that you gave of parents'  
14 names, parents' names is a highly factual question?

15 A Good point.

16 Q Is it fair to say that a consumer's perception  
17 of a brand is not really a factual question?

18 MR. CROSS: Objection to form.

19 A I don't know about that because if the  
20 perception is that this brand comes from so and  
21 so, that would be a fact. If the perception is  
22 that this brand is quality goods, there can be  
23 some fact behind that, based on my experience,  
24 and there can be some subjective judgment also.  
25 And that also -- from my perspective, subjective

1 judgment, to me, is a fact.

2 Q Maybe the way I should rephrase it would be to  
3 say a question of a consumer's perception of brand is  
4 more subjective than asking a question about what my  
5 parents' names are.

6 A Sure. That's a good characterization,  
7 certainly.

8 Q Part of your work with consumer psychology is  
9 how consumers respond to brands, right?

10 A Yes.

11 Q And is it fair to say that a consumer's  
12 response to a brand is based on that consumer's  
13 knowledge of the brand or the marketplace?

14 A Among other things, sure.

15 Q What other things tie into a consumer's  
16 perception of a brand? What other things would tie into  
17 a consumer's perception of a brand?

18 A Other people's experiences, the  
19 experience the consumer might have with  
20 competitive products. The consistency of a  
21 consumer's perceptions. The importance of -- I  
22 perceive probably a lot of attributes about that  
23 brand. And some would be more important than  
24 others. Some would be -- might well be more  
25 likely to drive my perception than others.

1 Q I'm going to ask you a little bit about the  
2 mechanics of how brand recognition works with the  
3 consumer.

4 A I'm not the world's greatest authority  
5 on brand recognition and stuff like that. But  
6 I'll be happy to try to answer the question.

7 Q You tell me if I'm getting too far afield.

8 MR. CROSS: It's the old, I do not know if you  
9 do not know.

10 THE WITNESS: Thank you.

11 Q Is it fair to say that a consumer has some  
12 perception of a brand that's stored in their knowledge  
13 base?

14 A Yes.

15 Q And when they get either an external cue or  
16 maybe an internal cue, it retrieves that information  
17 about a brand in their head. By that, I mean if I ask  
18 you what's a brand of sneakers, that would be an  
19 external cue that would trigger something in your memory  
20 about a brand?

21 A It would trigger -- yes.

22 Q So in some respects, brand information from a  
23 consumer perspective would be a type of knowledge that  
24 that consumer has based on a variety of inputs that I  
25 think you talked about, maybe interaction with

1 competitive brands, interactions with a particular  
2 product, knowledge of a marketplace?

3 A Yes.

4 Q When we're measuring brand strength, in some  
5 sense, we're trying to get at that consumer knowledge  
6 base to understand what it is based on and how strong  
7 the link is between a particular product and what a  
8 consumer thinks about when they're exposed to that  
9 product?

10 A It could be. Not necessarily always,  
11 but it could be.

12 Q In terms of talking about external cues, the  
13 example I gave you was asking you a question about  
14 sneakers. That external cue could also be a logo, a  
15 slogan, a trademark, something visual, a word mark that  
16 you would see and think, ah, Nike sneakers?

17 A Yes.

18 Q Would you agree with me that a strong brand is  
19 not a generic brand?

20 MR. CROSS: Objection to form and foundation.

21 A What's a generic brand?

22 Q Well, let me ask you this. If I wanted to  
23 determine whether something is a generic brand, is that  
24 a brand strength measurement?

25 MR. CROSS: Objection to the form and

1 foundation.

2 A Forgive me, what is generic brands?

3 Q If I were to ask about Kleenex, Kleenex is a  
4 registered mark of Kleenex, owned by, I think, Kimberly  
5 Clark, but a lot of people use the term "Kleenex" to  
6 mean Puffs or some other brand of tissue. If I want to  
7 figure out if my brand is being used in a generic way,  
8 is that a question of brand strength?

9 MR. CROSS: Objection to form and foundation.

10 A I don't think so.

11 Q Why don't you think so?

12 A What you're trying to figure out is  
13 how people use the brand's name. And I don't --  
14 I don't see that necessarily as brand strength.  
15 A strong brand is known to many people. A weak  
16 brand has a low level of awareness. There may  
17 be other facets of a brand strength, but they  
18 might be called something else.

19 What you're describing, I think, goes more to  
20 the issue of the identity, perhaps. Now, we're making  
21 some fine distinctions and we're bringing concepts in  
22 from marketing and from research and from the law. And  
23 they don't always fit -- they don't seem to fit together  
24 flawless.

25 Q There are different types of brand awareness,

1 aren't there?

2 MR. CROSS: Objection to form.

3 A There are different ways to ask the  
4 questions. Is that what you mean?

5 Q There are different ways to inquire about  
6 brand awareness?

7 A Yes.

8 Q One way would be aided awareness?

9 A That's correct.

10 Q If I said, do you know the Nike brand, that  
11 would be an aided awareness question, right?

12 A Uh-huh.

13 Q What about unaided awareness? That's a  
14 different way to get at the brand awareness question,  
15 right?

16 A Yes.

17 Q To keep with the sneaker thing, that would be  
18 if I asked name a brand of athletic footwear and you  
19 said Nike, correct?

20 A Keep it up, and we'll find a place for  
21 you. That's correct.

22 Q Then there's also something called top of mind  
23 awareness, right?

24 A There is, yes. Isn't that unaided  
25 awareness?



1           Q     It is, but it's a subset of unaided awareness.  
2     So if I'm Nike, I strive that when I ask a question,  
3     name an athletic footwear company, I want every consumer  
4     that responds, the first one out of their mouth to be  
5     Nike?

6           A     Okay.

7           Q     Is that a fair assessment?

8           A     Yes.

9           Q     Is it true that aided awareness is strong  
10    enough to drive a consumer's purchasing decision?

11           MR. CROSS:  Objection to form.

12          A     If you mean to say that recognizing  
13    the name of a brand when a person mentions it is  
14    all that's needed to drive a consumer's purchase  
15    situation, I really have doubts about that.  
16    That might work for some people, but if all I  
17    have to go on is a name and nothing else in  
18    memory and the name that only comes to mind -- I  
19    recognize it as opposed to offering it, unaided,  
20    is the word.  I don't know how much purchase  
21    that's going to drive.

22          Q     Let me give you an example.  It sounds like a  
23    bad joke, but if I walk into a bar, I'm going to see  
24    signs that say "Coors, Bud Lite" on-bar stuff, maybe a  
25    dart board, depending on your quality of bar.  And that

1 advertisement, in some respect, is intended to aid my  
2 awareness of the product. Do you agree with that?

3 A Do that again?

4 Q So that advertisement of a particular type of  
5 beer --

6 A You mean by virtue of being in the  
7 bar.

8 Q It's behind the bar, all their stuff is  
9 branded Budweiser. Is it intended to aid my awareness  
10 of the product, Budweiser beer?

11 A What that's going to do, as I  
12 understand the theory, is that you will see the  
13 name of a brand and that name should activate  
14 some things in your memory that will bring to  
15 the floor knowledge that you have, other  
16 knowledge about the brand. And it's the sum  
17 total of that knowledge that should activate the  
18 choice. That's different from what we were  
19 talking about a minute ago, which is just aided  
20 awareness driving the purchase.

21 Q Would you consider that sign behind the bar to  
22 be a form of aided awareness?

23 MR. CROSS: Objection to form and foundation.

24 A It does two things. One, it's part  
25 of, obviously, advertising and promotion and

1 marketing to try to build awareness, to try to  
2 reinforce the name of the brand. That's one  
3 thing.

4 And then it in and of itself reminds you of it  
5 and so in a sense can be a prompt to further remind you  
6 of the name.

7 Q And hopefully to buy that beer?

8 A I don't even know if that's criterion  
9 at that point. Sometimes you just want Nike, to  
10 use your example, wants to be the first one that  
11 comes to mind. If you're pinning your whole  
12 campaign on that sign, I would have concerns  
13 about your chief marketing officer.

14 Q That's certainly true for general marketing  
15 advertisement and television, billboards, magazines.  
16 There's a variety of reasons why it's being marketing in  
17 that fashion.

18 Do you think point-of-sale marketing or  
19 point-of-sale identification of a brand is different in  
20 that that point-of-sale marketing is specifically trying  
21 to get you to make a particular decision at that time to  
22 purchase the product?

23 A Given the way you've defined it,  
24 certainly it would be different, just because of  
25 the immediacy of the purchase situation.

1           Q     Would you agree with me it's possible that  
2     that sign being behind the bar could drive a consumer's  
3     purchasing decision?

4           MR. CROSS:   Objection to form.

5           A     If that's all there is and there is no  
6     other knowledge, no other information, then if  
7     that's the only sign, if I go into the saloon  
8     that you patronize regularly or at least that  
9     you talk about all the time, if I go into said  
10    premises and I am thirsty and I have this deep  
11    and abiding thirst for beer and there's a sign  
12    that says such and such brand, that's the only  
13    sign there is in the place, absent other  
14    preferences, I'd get that because I don't know  
15    of anything else.

16           So, yeah, in that situation, it certainly  
17    works well. That seems to be a pretty peculiar and  
18    highly specialized situation or maybe we go to different  
19    bars.

20          Q     It could be.

21           Would you agree that a consumer's knowledge of  
22    a brand provides a benefit to the consumer because it  
23    reduces the risk that the consumer would otherwise bear  
24    in not knowing what they are getting in a particular  
25    product or service?

1 A Yes.

2 Q And a brand creates a set of expectations?

3 A Yes.

4 Q And that's part of the knowledge that a  
5 consumer is going to be reminded of when they see a  
6 trademark, a logo, a slogan?

7 A We hope.

8 Q Would you agree that when a consumer sees a  
9 brand that they are familiar with, they may make certain  
10 assumptions about the product without doing a complete  
11 investigation of the product based on their knowledge of  
12 the quality of the brand or the quality of products  
13 typically put out by that brand?

14 A Yes, that's basically what we were  
15 talking about in the bar situation.

16 Q Because a consumer can't necessarily check  
17 every detail of every product, they will rely on their  
18 knowledge of a particular brand to make their purchasing  
19 decisions, for example?

20 A Correct.

21 Q And this would be, in a way, a way that  
22 counterfeits work, so if they look close enough, like a  
23 particular branded product, a consumer may not fully  
24 investigate what that product is, assuming it's their  
25 known brand, even though it's not their known brand?

1           A     I guess you could say that.

2           Q     Would you agree that the cost of creating a  
3 successful brand is large?

4           A     It depends.

5           Q     What does it depend on?

6           A     You just may have an extraordinarily  
7 good brand, and word of mouth may make that  
8 extraordinarily successful.

9           Q     Do you know anything about what the success  
10 rate is of launching a brand new brand into the  
11 marketplace?

12          A     No. Other than it is low, no.

13          Q     We talked about the benefits that a strong  
14 brand can bring for the consumer, but there would also  
15 be benefits for the owner of a strong brand. Can you  
16 think of what those benefits might be?

17          A     I would assume it would be the  
18 profitability and the potential to use that  
19 strong brand for line extensions.

20          Q     Would you agree that a strong brand also  
21 generates consumer loyalty, which may be of benefit to a  
22 brand owner?

23          A     Again, let me differentiate between  
24 the way I think about a strong brand and the way  
25 you might be using it.

1           A strong brand, at its most basic level in my  
2 mind, is a brand that has a high level of awareness.  
3 And that's not necessarily going to accrue to you in a  
4 beneficial manner. If you have a high level of  
5 awareness but very negative associations, then that is  
6 not a blessing. So a brand that is well-known, what I  
7 would call strong and has a lot of favorability is a  
8 recipe for loyalty, more than just the awareness.

9           Q     You raise a good point. If your brand doesn't  
10 have a strong level of favorability, it could have the  
11 exact opposite effect, that nobody wants what you're  
12 selling because of whatever issue is attributed to the  
13 brand of not having high favorability?

14          A     That is correct, I think.

15          Q     We talked about one of the benefits  
16 potentially being extension into a different product  
17 service category.

18                Is it fair to say that there are a number of  
19 different attributes that have to be considered when  
20 you're extending a brand into a new category, including  
21 things like different customers, different market  
22 competitors, different market dynamics?

23               MR. CROSS: Objection to form.

24          A     It depends. That could be -- your  
25 answer is not incorrect, but it certainly

1 depends what we're going to expand into.

2 Q Let me change topics from brand discussion.

3 A Okay.

4 Q Thank you for that. I want to talk a little  
5 bit about surveys.

6 A Good.

7 Q Now, you designed and conducted a variety of  
8 brand-related surveys?

9 A Yes.

10 Q How many surveys would you say that you  
11 conducted for either brand awareness or the likelihood  
12 of confusion in 2011, ballpark?

13 A Last year?

14 Q Yes.

15 A A small number. Twenty, 30, something  
16 like that.

17 Q Is that typical over the last, say, ten years?

18 A No.

19 Q What would you say would be a typical number  
20 over the last ten years, if there is a typical number  
21 over the last ten years.

22 MR. CROSS: On an annual basis?

23 MS. DICKSON: On an annual basis.

24 A It's all over the place. It's driven  
25 by -- a lot of it is driven by the economy.



1 Q Sure.

2 A And, actually, the desire among  
3 clients and potential clients for brand  
4 information, so I can't be more responsive.  
5 Last year was not the best year.

6 Q If you had said 20 or 30 was maybe toward the  
7 lower end of an annual number of surveys, could you give  
8 me a ballpark on a really busy year?

9 A We like to run 50 to 75 studies.

10 Q And you've done mall intercept surveys?

11 A Yes.

12 Q Telephone surveys?

13 A Yes.

14 Q Have you done internet-based surveys, too?

15 A Yes.

16 Q Are there any other type of surveys -- well,  
17 in-person surveys?

18 A Yes.

19 Q Are there other types of survey mechanisms  
20 that you've used that I haven't mentioned?

21 A Yes.

22 Q And what are those?

23 A We've done pure mail surveys.

24 Q I always forget snail mail.

25 A We've done -- within the context of

1 the internet, we've done both internet panel  
2 surveys and we have done internet surveys where  
3 we recruited our own respondents randomly.  
4 That's the quantitative techniques. That pretty  
5 much covers it, survey techniques.

6 Q A telephone survey would generate a random  
7 sample; is that right?

8 MR. CROSS: Objection to form.

9 A You could generate a random sample to  
10 use in a telephone survey. It doesn't  
11 intrinsically generate anything.

12 Q That's true. And a mall intercept survey  
13 provides a slightly less random sample because you have  
14 to actually approach people to ask if you want to  
15 participate in the survey. In some sense, your person  
16 recruiting the people to be interviewed is picking  
17 people out of a crowd?

18 A Well, your initial statement about  
19 providing less of a random sample is correct.  
20 Attributing it to the interviewer is not  
21 necessarily correct in the sense that it's  
22 typical that in instructions to the interviewer,  
23 you frequently say something like -- position  
24 yourself where you're allowed to be and then  
25 count every "X" number of persons that pass you

1 and then approach that individual. And the  
2 purpose of that is to minimize the interviewer's  
3 discretion in recruiting a sample -- in  
4 proposing a sample.

5 Q I thought it was the interviewer approaching  
6 people, but you said the first part of the statement is  
7 correct, a mall intercept is not a random sample.

8 A Fair.

9 Q What's the reason that I was incorrect in  
10 assuming, but what's the real reason?

11 A I don't know if it's the real reason,  
12 but the reason that I was taught and believe in  
13 is that when we talk about a random sample of  
14 the United States, we mean that everybody who  
15 has a phone has a chance to be contacted, and we  
16 can even calculate the probability.

17 When we talk about a mall intercept, the  
18 likelihood that you're going to be contacted or  
19 approached -- I think it's directly proportional to how  
20 far you are from a mall that has an interviewing  
21 facility, whether or not you have a driver's license and  
22 some other considerations.

23 So there's not the same, for lack of a better  
24 word, coverage, and the lesser coverage is not random.  
25 Malls are located where there are buyers and where you

1 can by the land necessary to erect it. I think there  
2 may be one in Manhattan. There used to be one in  
3 Macy's, it was a vertical mall, sort of. And you'll  
4 find in some other much smaller cities, there could be  
5 two or three. Typically, they're suburban. There are  
6 not very many in Montana or Idaho because we don't have  
7 concentrations of populations. There are not many in  
8 areas where the population doesn't have discretionary  
9 income, because those people are of less interest to  
10 sellers of a lot of product. So you don't want to put  
11 the mall there.

12 And from a marketing survey research  
13 perspective, they're of less interest because not that  
14 many potential clients care that much about the opinions  
15 of those people.

16 So, in that sense, because malls are national  
17 in spread, are not everywhere. You don't have the same  
18 coverage. On balance, though, the loss is considered  
19 minimal. Every day, companies make incredibly expensive  
20 business decisions using mall intercept interviews.

21 Q Recognizing that there are certain areas or  
22 population groups?

23 A Trade-offs. Yes. It obviously does  
24 not make the mall intercept inferior. There  
25 were times when you need to show people

1 something, and that is the way to go. I use  
2 both methodologies.

3 Q And you just said when you have to show people  
4 something. Is it your preference when you have a visual  
5 stimuli or a product, to use a mall intercept survey  
6 because you have to show somebody something?

7 A As opposed to?

8 Q As opposed to an internet survey, for example?

9 A That depends on the product. If it's  
10 a technology product, I am indifferent to  
11 predispose towards the internet. If it is a  
12 product where it's more than showing, there are  
13 certain tactile clues, the weight, the feel,  
14 smell. If other modalities are involved beyond  
15 just looking at something, then that would speak  
16 to a mall intercept. And there are timing and  
17 cost issues.

18 Q Sure. If you don't have a product or a logo  
19 or the tactile clues that you want a consumer to look  
20 at, if you just have a word mark, is there a reason why  
21 you would do a mall intercept survey versus a telephone  
22 survey?

23 A It depends on the word mark. If, best  
24 of all worlds, you just show people a sign,  
25 assuming the mark is known by -- it's printed or

1 written name or whatever and that way I don't  
2 have the interviewer, telephone interviewer  
3 reading something which, to some degree puts me  
4 at the mercy of the interviewer, unless as  
5 you've done, we hire a professional person to  
6 read the name or names or more likely the  
7 statement. And we record that and everybody  
8 gets it on a little cassette, so I have  
9 uniformity, which is another potential source of  
10 error, absence of uniformity. And I overcome  
11 problems in vocal communication, which is pretty  
12 much what I am stuck with on a telephone  
13 interview.

14 Does that answer you?

15 Q It does.

16 What if you don't have a picture of what the  
17 words look like on the product? What if you just have  
18 the words so the packaging hasn't been completed yet?  
19 Would you show consumers the words just printed even  
20 though that's not how they're going to appear on the  
21 final packaging or would you conduct a telephone survey  
22 because you're going to vocalize just the words or would  
23 you do something else?

24 A In that case, from a methodology point  
25 of view, and assuming the words are simple words

1 and it's short and all that stuff, I'd probably  
2 be indifferent methodologically. And other  
3 factors, usually timing and cost considerations,  
4 would come into play.

5 Q Could you give me a rough percentage of, say,  
6 your surveys last year that you did? How many were mall  
7 intercept, how many were telephone, how many were  
8 internet? Or something else.

9 A Sure. Last year, probably half were  
10 mall intercept. And of the rest, it would be  
11 equally split or 25 percent/25 percent or 30  
12 percent/20 percent internet versus phone.

13 MS. DICKSON: I'm about to start a new topic.  
14 Do you guys need a break? We have been going about  
15 an hour.

16 THE WITNESS: I'll take a break.

17 (Recess taken at this point.)

18 Q If you take a look at the report you gave us,  
19 your CV is attached to the back. I want to talk about  
20 one of the cases that you've listed, the champagne --

21 A Crystal.

22 Q Can I call it the Crystal case?

23 A You can call it anything you want. I  
24 gather you don't have a minor in French?

25 Q I do not.

1 A Yes.

2 Q Just for purposes of the record, your resume  
3 is attached to the back of what we have marked as Kaplan  
4 Exhibit 1.

5 The case I'm referencing that we're going to  
6 refer to as the Crystal case is the case listed under  
7 "Trial Testimony the Past Four Years" on the last page;  
8 is that correct?

9 A That's correct.

10 Q In this case, what were you hired to do?

11 A I was hired to conduct a study into  
12 the likelihood of confusion between my client,  
13 who is the maker of Crystal, a very expensive  
14 champagne and another firm's product called  
15 Cristalino, a very inexpensive sparkling wine.

16 Q And you provided deposition testimony and  
17 testified at trial?

18 A That is correct.

19 Q In relation to your opinions on the likelihood  
20 of confusion between Crystal and Cristalino?

21 A Correct.

22 Q And your opinion was accepted by the court; is  
23 that correct?

24 MR. CROSS: Objection to form.

25 A On balance, I think that's a fair



1 statement, yes. I think.

2 Q I didn't have a copy of your opinion, so what  
3 I'm going to hand you, I don't know if you've ever seen  
4 this before, but this may help in case you need it, a  
5 reference document about this case.

6 MS. DICKSON: Actually let's mark this Kaplan  
7 3.

8 (Order and injunction marked Kaplan Exhibit 3  
9 for identification, as of this date.)

10 Q If you would, Dr. Kaplan, take a look at what  
11 we have marked as Kaplan Exhibit 3, and this is an order  
12 and injunction from the case that's referenced on your  
13 CV.

14 Have you ever seen this document before?

15 A Actually, I don't think so. They  
16 never tell me, I'm the last one to know.

17 Q I'm not going to ask you questions necessarily  
18 about this specific document, but if you turn to Page  
19 36, using the bottom numbers, if you look at the  
20 paragraph numbers, it starts at 112, it gives some  
21 summary of the work that was performed in this case. If  
22 you need it as a reference, feel free to refer to it.  
23 That's where some of my questions are going to come  
24 from, but you may know from just having done the work.  
25 I just wanted to give it to you if it is a help.

1 A Thank you.

2 Q Go ahead if you want to take a look at it  
3 again.

4 A No.

5 Q So we were talking about this case that you  
6 had opined on the likelihood of confusion. It appears  
7 that you performed a survey to determine that likelihood  
8 of confusion; is that correct?

9 A That's correct.

10 Q I'm looking at Paragraph 114, Judge Ericson's  
11 order states that, "Dr. Kaplan defined the survey  
12 universe as people who were 21 or older, had purchased  
13 in the past six months or were likely to purchase in the  
14 next six months imported sparkling wine under \$35 and  
15 were aware of Crystal champagne before the interview."

16 Is that an accurate statement of how you  
17 defined the universe for the survey?

18 A Actually, I'm not completely certain  
19 whether it was an "or," as it says, "or were  
20 likely to purchase" or whether it was an "and."  
21 I'm not completely certain right now. This  
22 statement itself as it stands, other than that,  
23 is correct.

24 Q Is it standard practice to have screening  
25 criteria for a survey to define the survey population?

1 A Yes.

2 Q And is its best practice to phrase questions  
3 that define -- implement that screening criteria to  
4 require an affirmative response so that, for example, if  
5 I wanted a population over 18, I would ask, "Are you  
6 older than 18" to get an affirmative response?

7 A Not necessarily. Using your example,  
8 I would -- in age, just off the top, I would say  
9 something akin to, "Which of the following  
10 categories best describe your age, under 18, 18  
11 to 21, 21 to 39, 40 or above," or some split  
12 like that.

13 I would not necessarily give you a "Yes/No" or  
14 "Yes," was the right answer or "No" was the right answer  
15 unless it was unavoidable.

16 Q Would it be considered improper to use a  
17 "Yes/No" question in order to establish the screening  
18 criteria of whether it's age, gender, are you female,  
19 over age or whatever?

20 A I don't necessarily think it is  
21 improper. If you want what I regard as better,  
22 if not best practice, I would try to word the  
23 question to ultimately provide me with the  
24 information I need, but give the respondent more  
25 choice, not necessarily focus the respondent on

1 a "Yes" or "No." If one were to use the  
2 "Yes/No," I could say, "I'm going to read you  
3 several age ranges. Are you under 18? Yes/No.  
4 Are you between 18 and 29? Yes/No," et cetera,  
5 and it would accomplish -- hopefully, I would  
6 get one answer, one "Yes."

7 Q If you are going to do the age question, "Are  
8 you over 18" and you only want respondents over 18, by  
9 requiring a "Yes" answer, it doesn't matter what else  
10 anybody says. If they don't say "Yes," they're not  
11 going to be part of the universe?

12 A That's correct.

13 Q If you take a look at --

14 A If I may?

15 Q Yes.

16 A I could have asked, "Are you under  
17 18," in which case a "No" answer qualifies you,  
18 so it's not always the "Yes" answer or the "No"  
19 answer. It goes to the issue if I want people  
20 who do not drink alcoholic beverages, then the  
21 "No" answer is the key to proceeding. The "Yes"  
22 answer or "Don't Know" is a termination kind of  
23 question.

24 Q And if you want the "No" universe, the people  
25 who say "No," anything else that anybody else says

1 that's not "No" would result in them not being included  
2 in the universe?

3 A That is correct.

4 Q You could do it as a "Yes" or a "No"?

5 A There are lots of ways you can do it.

6 Q Let's take a look at what we have marked as  
7 Kaplan Exhibit 2. Have you seen this document before?

8 A I believe so.

9 Q And can you identify this document for the  
10 record?

11 A I believe this is the report Dr. Sabol  
12 prepared in this matter.

13 Q So, if you would take a look at the last page  
14 of this, I believe these are the survey questions Dr.  
15 Sabol used?

16 A I think so, too.

17 Q If you look at Question No. 1, that looks like  
18 it's under Screen B, number 1. Would you agree if you  
19 answer anything other than a "Yes" to Smart Ones, you  
20 are not going to be included in the survey universe?

21 A As for his instructions, I agree, you  
22 need to say -- as he says below it, "If heard of  
23 Smart Ones, continue. If not, terminate." I  
24 agree with you.

25 Q If I were to say in response to Question No.

1 1, "I don't know," I'm not going to be included in the  
2 survey response because I have to say affirmatively  
3 "Yes" to Smart Ones in order to be included?

4 A Actually, there would be a problem  
5 because if you said "Don't Know," I wouldn't  
6 have a place to record that.

7 Q It wouldn't be recorded, but I wouldn't be  
8 eligible to be in the universe because I didn't say  
9 "Yes," correct?

10 A I guess you could say that. Yeah. It  
11 is, however, not good practice to not have a  
12 "Don't Know" column, because "Don't Know" is not  
13 a completely unreasonable choice -- not a  
14 completely unreasonable answer.

15 Q In your report, did you assess --

16 A This is Exhibit 1?

17 Q This is Exhibit 1.

18 You point out that Dr. Sabol did not offer an  
19 "I don't know" column for this Question No. 1 in his  
20 survey?

21 A That is correct.

22 Q Did you assess any weight or impact that not  
23 offering an "I don't know" option in Question 1 would  
24 have on his survey results?

25 A Not offering a "Don't Know" in and of

1     itself doesn't impact the weight I would put on  
2     the outcome.

3           Q     Let's go back for a second to the Cristalino  
4     case, which is Exhibit 3. Is it true that when you were  
5     doing your study, Cristalino was already on the market  
6     and was competing or at least -- was already on the  
7     market?

8           A     For about a couple hundred years.

9           Q     Crystal was?

10          A     Crystal.

11          Q     Cristalino?

12          A     See the confusion. I rest my case.  
13     Cristalino had been on the market in the United  
14     States for a few years. Yes, it is true.

15          Q     And when you did your survey, what were  
16     consumers, survey participants shown as they were  
17     commenting on whether or not they thought there was a  
18     likelihood of confusion?

19                 What I'm getting at is did they just see  
20     Crystal, Cristalino, the marks, did they see the  
21     packaging?

22          A     Oh, this was a likelihood of confusion  
23     study that was a point-of-sale type of  
24     confusion, likelihood of confusion study.  
25     Initially, they responded -- saw a bottle of

1 Crystal exactly as one would see it in a liquor  
2 store with whatever wrapping it has or one would  
3 see it if it were brought to the table if you  
4 asked about it in a restaurant. That was taken  
5 away.

6 Q Okay.

7 A We asked them questions and we asked  
8 some distracting questions about TV viewing  
9 habits or something. Then respondents were  
10 shown an array of four bottles of imported  
11 sparkling wines, one of which in the test cell  
12 was Cristalino, and the other three were  
13 brands -- the same price point that were likely  
14 to be seen on the same shelf or in the same  
15 aisle or proximate to the Cristalino. Because  
16 there's some sorting by price point, and there's  
17 certainly sorting by U.S. or European or  
18 whatever.

19 Q Okay.

20 A And those bottles were arrayed in an  
21 order that was varied with different  
22 respondents, so there was no position kind of  
23 bias, but those bottles were shown exactly as  
24 they would be seen in the marketplace. There  
25 was a control cell, everything was exactly the



1 same, except there was no Cristalino in that  
2 cell.

3 There was -- actually, there was the exact  
4 same bottle, Cristalino bottles, with all the labeling  
5 removed, and every place it said "Cristalino," it was  
6 replaced with a name that we made up, "Courtalino."

7 So that we parsed out everything with the  
8 exception of the name, and the names were as close as I  
9 could make them. That answers your question?

10 Q It does. In this opposition, have you seen  
11 any packaging or labels for Smart Balance Frozen Meals?

12 A No.

13 Q Would you agree that at this point in time in  
14 doing a likelihood of confusion survey as between Smart  
15 Balance and Smart Ones, the only stimulus that's  
16 available to be shown to consumers are the actual word  
17 marks?

18 A The names, yes. Absolutely.  
19 Absolutely.

20 Q And if you were conducting a likelihood of  
21 confusion study between Smart Balance and Smart Ones  
22 because you don't have the actual packaging of what  
23 Smart Balance is going to use, would you show a mockup  
24 of those word marks to conduct the survey or would it be  
25 more appropriate to have them spoken because you don't

1 know what the packaging is going to look like?

2 MR. CROSS: Objection to form.

3 A My preference, for the reasons  
4 discussed earlier, would be to show them the  
5 names. And it's a modest preference at most. I  
6 would show them the names because they're not  
7 terribly complicated words. It's not overly  
8 long, and we're just dealing with the names.  
9 Those are factors that also say you're not going  
10 to get in a lot of trouble if you do it by  
11 phone, to be perfectly honest, so they work in  
12 both cases.

13 And I would show them the names because,  
14 again, in the marketplace situation, unless you've got a  
15 six-year-old, who's finally figured out the code and  
16 knows how to read and reads everything and you're  
17 shopping with that person, nobody is going to be leaning  
18 over your shoulder reading names to you.

19 So that's a minor consideration -- that's not  
20 a super big to do. I think -- I didn't have a  
21 criticism, I don't believe, about the method, the phone  
22 methodology.

23 Q I don't believe you did either. I'm just  
24 trying to understand.

25 We talked about different ways of constructing

1 this, and I'm wondering if I show -- visually show these  
2 names, and it's not how the products are going to  
3 actually appear in the marketplace because I don't know  
4 how the products are actually going to appear in the  
5 marketplace, I haven't seen the packaging -- if that  
6 could introduce noise into the survey results by showing  
7 packaging that's not going to actually appear in the  
8 marketplace?

9 A If you had packaging that didn't  
10 appear because, in a sense, my client is the one  
11 that's working on the packaging, there might be  
12 a slim chance that that would be okay.

13 However, you would certainly, I believe, be  
14 safer to not deal with packaging at all. Because if the  
15 packaging were changed between now and when you went to  
16 product, and then one might argue that the results of  
17 this study no longer apply and the issue of likelihood  
18 of confusion wouldn't be dead. I'm in agreement with  
19 using names as the stimuli.

20 Q Going back to --

21 A You beat that out of me.

22 Q Going back to our Crystal/Cristalino case, and  
23 I'm looking back at Paragraph 114 and this is where we  
24 had the "and/or" question, had purchased in the past six  
25 months and were likely to purchase in the next six

1 months imported sparkling wines, to test likelihood of  
2 confusion in this instance, you added on the potential  
3 participants, people in the universe had to be aware of  
4 Crystal champagne before the interview.

5 Why did you have that awareness requirement as  
6 part of the universe definition?

7 A That's in Paragraph 115. Good  
8 question. All -- as I said earlier on, all  
9 studies, among them, likelihood of confusion  
10 studies, ultimately are driven by the manner  
11 that we're going to research and the  
12 idiosyncrasies of it.

13 Crystal champagne was a unique -- is a unique  
14 product from my perspective as a research person, it's a  
15 niche product, it has a small market, it is at the high  
16 end of the price spectrum. And most important in this  
17 context, it's not a product that intends to grow at all.  
18 They are -- and I discovered this in discussion -- they  
19 are constrained by their vineyards. They sell out all  
20 the product they produce year in and year out, and  
21 there's an untapped market, but you can't -- you can't  
22 add vineyards, it's not like putting another plant on.

23 So we have a situation where the product is  
24 not concerned about growing. They are not looking at  
25 additional markets. The issue is around their

1 customers. It's always around their customers.

2 And my interpretation of what constituted the  
3 appropriate universe, in this instance, was their  
4 customers. And because they don't sell that -- there  
5 aren't that many of their customers. I would probably  
6 still be interviewing if I wanted to get a couple of  
7 hundred.

8 We used as a surrogate self-proclaimed  
9 awareness of the product. So I used people who were  
10 aware of it as -- I used awareness of it as a screening  
11 criteria, among other things, and the critical factor  
12 was they're not -- they're capacity constrained and  
13 cannot get bigger, and there is nothing more going on  
14 here in this context.

15 And also, they are in such an exquisite niche  
16 in the marketplace, conceptually in some ways this was  
17 difficult because I've got a bottle that sells for  
18 between 250 and \$500, where you buy it, and something  
19 that sells for between \$6.95, 7 and \$10. But, again,  
20 that was difficult. I gave that a lot of thought, but I  
21 felt that primarily because the market for a product  
22 that's capacity-constrained the way they are, the  
23 relevant market is only their purchasers, it would see  
24 an appropriate universe.

25 The judge did not agree with me. And I

1 thought this was, in my mind, the absolute perfect  
2 example of that situation. In my mind, it was no  
3 different from, let us say we have a product that's only  
4 sold in the northeast. So I would do my survey in the  
5 northeast part of the United States. As long as the  
6 client never intended to broaden their marketplace to  
7 other places. I saw -- and that's an acceptable  
8 constraint on a sample. And I believe that the  
9 situations were totally analogous. And the person whose  
10 opinion counted most understood what I was saying, but,  
11 on balance, she felt that she didn't agree. And so I  
12 have been chastised.

13 Q Let me ask you this. In terms of structuring  
14 the survey, could you have done a likelihood of  
15 confusion survey where the awareness requirement would  
16 have been awareness of Cristalino instead of Crystal?

17 A For a different issue, I could have.  
18 The answer of course is yes. I could do an  
19 awareness -- likelihood of confusion study,  
20 where the screening question is awareness of  
21 Budweiser, but whether it would be right or not  
22 is a different issue.

23 The issue of universe is, I think, the  
24 courts -- the cases say that that's the most important  
25 issue. After you figure out what the -- analyzing the

1 question is, so you spend really an awful lot of time on  
2 that. And you could define it any way you want, but it  
3 comes down to which is the right way.

4 Q Let's take a look at your report, which is  
5 Kaplan Exhibit 1. I want to take a look at Paragraph 9  
6 on Page 3.

7 A Yes.

8 Q So, Paragraph 9 references a quote, which I  
9 think is actually on Page 1 of Kaplan Exhibit 2. It  
10 starts "Primary Objectives." It says "Smart Brands." I  
11 think it should say "Smart Balance," correct, instead of  
12 "Smart Brands"?

13 A I proofed this several times.

14 Q It happens. While we're all here, I'm just  
15 making sure, "which may occur from the introduction of  
16 Smart Balance Frozen Meals."

17 A Yes.

18 Q And then if you look at Kaplan 2, which is Dr.  
19 Sabol's report, the bullet point that's referenced goes  
20 on to say, "An introduction of Smart Balance Frozen  
21 Meals in the same frozen meals section of supermarkets  
22 where Smart Ones Frozen Meals are already sold." Did I  
23 read that correctly?

24 A Yes, you did.

25 Q Isn't the universe that Dr. Sabol is defining

1 the frozen meals section of supermarkets, where Smart  
2 Ones frozen meals are already sold?

3 A The universe he is defining is -- and  
4 I take this from Screener Question B,  
5 individuals who personally have purchased frozen  
6 meals from the frozen food section of the  
7 supermarket in the past 30 days, which likely  
8 does encompass the frozen meals section. I  
9 assume that's where Smart Ones Frozen Meals  
10 would be, who have ever heard of Smart Ones.

11 Q Got you. Okay.

12 While we're here, it's easier to correct on  
13 the record than to hit you with it later and say,  
14 "What's going on?"

15 In this study, if all we look at are what  
16 current customers of Smart Ones -- the likelihood of  
17 confusion of current customers of Smart Ones, doesn't  
18 that provide some information on the likelihood of  
19 confusion, even though we could have done a broader  
20 survey to encompass potential customers?

21 A There is no question that any survey  
22 provides some information and it needs to be  
23 couched in the context of the universe as  
24 defined. Actually, this is not current  
25 customers, this is ever heard of, so people who



1 would have awareness. And that would provide  
2 you -- I'm not arguing about that. That would  
3 provide you with some information.

4 If it's a marketing person, I was interested  
5 in how those people who are aware of my brand and only  
6 those people think about whatever follows, then that  
7 would certainly be the appropriate universe.

8 So A, it depends on how you define the basic  
9 problem, the basic question from which flows the  
10 universe, and it depends on the rules that we are given  
11 and how we interpret them in terms of what the universe  
12 should be.

13 Q Okay. I'm going to ask you to take a look in  
14 Kaplan 1 at Paragraph 12.

15 A Yes.

16 Q And Paragraph 12 is one of several paragraphs  
17 where Ms. Sherri Diamond, her reference article is  
18 cited.

19 Is there a particular reason why you focused  
20 on Ms. Diamond's article throughout?

21 A She's a very, very smart lady. Her  
22 reference guide is standard in the field. It's  
23 from the Federal Judicial Center. There are  
24 some treatises that I have learned I need to  
25 refer to. I have learned that I needed to read

1 and become familiar with and refer to on  
2 occasion because I can't figure it all out by  
3 myself. And she is one of the people who is  
4 both a psychologist and an attorney and has a  
5 foot in both camps. Thank goodness there are  
6 only two camps. And her insights are very  
7 valuable. And if I don't line up with her, you  
8 know, I need to be sure that I understand why  
9 the idiosyncrasies of a particular matter lead  
10 me to a conclusion different from hers. And she  
11 cited the first case I ever testified.

12 Q Looking at Paragraph 12, there's a snippet  
13 quoted from Ms. Diamond's article. And the snippet  
14 says, "The survey's value depends on the extent to which  
15 the excluded population is likely to react differently  
16 from the included population."

17 A Did I get that right?

18 Q You did.

19 A We should get that on the record, I  
20 got one right.

21 Q In this instance, she's talking about the  
22 situation where there is an underinclusive universe?

23 A That's correct.

24 Q So if it's not an underinclusive universe,  
25 then there's not a requirement to figure out what some

1 other aspect of a population would have, could have  
2 said, if it's not deemed an underinclusive universe?

3 A Absolutely.

4 Q You indicated in your report that you believe  
5 Dr. Sabol's universe was underinclusive; is that  
6 correct?

7 A That's correct.

8 Q Do you have a sense of what the population  
9 that you believe should have been included, how they  
10 would have responded to the survey questions in terms of  
11 likelihood of confusion?

12 MR. CROSS: Objection to form and foundation.

13 You may answer.

14 A First, I think the universe should be  
15 people who are likely to be purchasers of frozen  
16 meals in the coming three months or whatever  
17 time frame.

18 So the first omission in terms of comparing my  
19 concept of what the proper universe is versus his  
20 concept as defined by what he did is everyone who either  
21 is not aware -- everyone who would answer Question 1 by  
22 saying they're not aware of Smart Ones or they don't  
23 know if they ever heard of it.

24 Now, with regard to whether or not those  
25 potential frozen meal purchasers would be different from

1 those who are aware in their answers -- in their answers  
2 to some question, like, "Which have you ever purchased,"  
3 we know they would be different, and, "Which do you  
4 purchase most often," we know they would be different  
5 too. But that's not what you're interested in, I get  
6 the feeling.

7 In answer to the confusion question, Question  
8 3, you know, I'm not sure what their answer would be.  
9 But if they have no awareness of Smart Ones, it's going  
10 to be hard to see how they're going to answer -- it's  
11 going to be hard to understand the foundation for their  
12 answer to Question 3.

13 We had talked earlier about the linkage  
14 between a brand's name and the various associations,  
15 cognitive associations one has, and if there's not the  
16 awareness, there's nothing to link to.

17 Q So they would basically be left with looking  
18 at -- if we did it visually, is that just the marks  
19 themselves and saying --

20 A A couple of names is what they would  
21 be looking at.

22 Q Yes, is it confusing? No, it's not confusing  
23 based pretty much on just what they see in front of them  
24 or what they hear?

25 A That's the task.

1           Q     Because we don't know what they're basing it  
2 on, could that be introducing noise into the survey by  
3 including them?

4           MR. CROSS:   Objection to form.

5           A     If they're part of the universe, then  
6 including them, in theory, is not introducing  
7 noise. They have a right to be here because  
8 they are part of the universe. Their answers  
9 are equally as valid as anyone else in the  
10 universe. So that in that sense, the answer to  
11 your question is, no, they're not introducing  
12 noise, they are introducing signal as they see  
13 it.

14          Q     And you started your response by saying, "If  
15 they are part of the universe"?

16          A     And I believe they are, and Dr. Sabol  
17 doesn't.

18          Q     If you were to define the universe by not  
19 including them -- if you were to think the universe does  
20 not include them, if you somehow polled them for  
21 likelihood of confusion purposes and included their  
22 responses in that question, that could be the  
23 introduction of noise?

24          A     If the universe doesn't include them,  
25 then you would have an overinclusive sample, and

1 that would be slightly less of a problem --  
2 generally considered slightly less of a problem  
3 than an underinclusive sample because,  
4 hopefully, I can back them out by the answer to  
5 that question.

6 Q Okay. Do you have any reason to believe that  
7 the segment that you contend should have been in the  
8 universe, that Dr. Sabol is not in the universe, that  
9 they would have answered the question on likelihood of  
10 confusion any differently than the sample that Dr. Sabol  
11 did report and considered the universe?

12 A I expect there would be differences  
13 based on the fact that they have no awareness of  
14 Smart Ones.

15 Q How do you think their answers would have been  
16 different?

17 A I don't know. What I do know is they  
18 are different on a critical consideration for  
19 this study. The difference is not that they  
20 wear glasses or don't wear glasses or they have  
21 long hair or short hair. This goes to the  
22 critical issue here.

23 Q Okay. Let me ask you, when you looked at -- I  
24 brought both. When you looked at the Diamond article,  
25 were you using the print version or there's an online

1 version as well. Do you know?

2 A I have a hard copy of it.

3 Q I think they are the same.

4 A I downloaded from the Federal Judicial  
5 Center.

6 Q Then you have the electronic.

7 A Some people read the Bible on Sundays.

8 Q You're reading a reference guide or survey  
9 research.

10 MS. DICKSON: Mark this as Kaplan 4.

11 (Article by Sherri Diamond marked Kaplan  
12 Exhibit 4 for identification, as of this date.)

13 Q Dr. Kaplan, if you take a look at Exhibit 4,  
14 is this the article that you reference in your report?

15 A It looks like it, yes.

16 Q Take a look at the top of Page 242. Ms.  
17 Diamond reports, "In some cases, it is difficult to  
18 determine whether an underinclusive universe distorts  
19 the results of the survey, and if so, the extent and  
20 likely direction of the bias."

21 Do you see where I'm looking?

22 A Yes, I do. Did I get the page wrong  
23 again?

24 Q You may be right. There's different versions  
25 of this floating around. Some of the numbering is a

1 little different.

2 A I see the sentence you alluded to.

3 Q Do you agree with Ms. Diamond's statement?

4 A Yes, I think that's what I said when  
5 you asked me how -- what I would expect, and  
6 we're in agreement. I couldn't tell you, but I  
7 would expect that it does, in her words, distort  
8 the results.

9 Q And so for confirmation, your report, Kaplan  
10 Exhibit 1, does not state definitively that there is a  
11 bias due to the underinclusive -- your argument that  
12 there is an underinclusive universe for this survey; is  
13 that correct?

14 A Well, I actually redid the  
15 calculations attributing zero information on all  
16 the other questions to these people, which is  
17 how it's sometimes done. I said there were  
18 mistakes in the population. I guess I did not  
19 say explicitly that it distorts the results and  
20 I should have been more specific.

21 I stopped at the point of saying that it's an  
22 underinclusive universe, and to me, that's enough in the  
23 absence of some kind of -- that's enough. I couldn't  
24 swear about -- had I said that it distorted it with a  
25 certainty, then no doubt, you would have asked me what



1 that distortion was and what I based that on. And as I  
2 said, it's an unknowable, but we do know, from my  
3 perspective, that the universe definitely is inadequate.

4 Q Would you agree that it is possible that the  
5 underinclusiveness of the universe could have no effect  
6 whatsoever on the actual results as they have been  
7 reported?

8 A It is possible.

9 Q If you take a look on Page 240 of Exhibit 4,  
10 Kaplan Exhibit 4, the first sentence under heading B.  
11 Ms. Diamond states, "The target population consists of  
12 all individuals or units that the researcher would like  
13 to study."

14 Is that a definition of universe for study  
15 purposes?

16 MR. CROSS: Objection to form.

17 A Yeah, that's certainly -- yeah, in a  
18 very high order sense, that's a definition.

19 Q If Dr. Sabol defines his universe as only  
20 those who are aware of Smart Ones and have made a  
21 purchase of frozen meals because that's the current  
22 Smart Ones market, could he define his universe that way  
23 and be completely inclusive?

24 But you could look at it as a different  
25 researcher and define the universe differently, and both

1 studies would still be providing analysis of likelihood  
2 of confusion?

3 MR. CROSS: Objection to form.

4 A Two things, what you're saying is not  
5 untrue. If that were the case, first, Dr.  
6 Sabol, I think, should have added that  
7 qualification, that universe description to the  
8 title of the study, among the past purchasers of  
9 frozen foods who are aware of Smart Ones. So  
10 that's first.

11 And by not having that in, I think  
12 inadvertently the potential reader is misled to assuming  
13 something that's not.

14 And more relevant, my understanding as a  
15 nonattorney, but a fan of these kinds of cases, is that  
16 there are standards that we would -- that should be  
17 applied so that the researcher doesn't necessarily pick  
18 and choose the universe of his preference.

19 Because if that were the case, everybody would  
20 have their own definition, and everybody would have  
21 their own study, and we could prove anything.

22 So, yes, this statement is correct, but it  
23 assumes that the researcher is enlightened by truth or  
24 at least prior cases or Sherri Diamond's reference. I'm  
25 sorry.

1 Q That's okay. If we leave the Diamond article  
2 and go back to the Crystal case, which I think is Kaplan  
3 3, I'm looking at --

4 A Excuse me?

5 Q We're looking at Kaplan 3, we're back on the  
6 Crystal.

7 A The page?

8 Q Thirty-seven. I think it's in Paragraph 115.

9 A Okay.

10 Q It's toward the bottom. It looks like you  
11 provided an estimate that you would have to bring 90  
12 people to the interview room to try to get 30 survey  
13 participants who would fit the criteria that you  
14 identified?

15 A Actually, that is not the case. That  
16 was a -- we, in giving instructions to the  
17 interviewing facility, gave as a for-example, in  
18 going through these screening criteria, about  
19 one and three qualified. To get 30 qualified  
20 people to be interviewed, you would need to  
21 screen 90. That was as a for-example only.

22 The Defendant's expert reinterpreted that as a  
23 suggestion on my part. The dilemma we had, which is not  
24 an uncommon dilemma but was really a stretch here, was I  
25 didn't know, and the client was not in a position to

1 tell me how many individuals who met the other criteria  
2 had awareness of their brand.

3 And that was -- in those situations, you don't  
4 know what to expect and you really can't help people  
5 because, as you can imagine, the number of people we  
6 have to go through to get a qualified person has an  
7 effect on when I'm done and how much it cost me. The  
8 general level of effort. So that is a  
9 mischaracterization of what we used this information --  
10 this example for.

11 Q I'm just using it to the extent it helps.

12 If you look at the bottom of Page 38, it's  
13 footnote 8, and it reports one of the questions that was  
14 asked.

15 A Uh-huh.

16 Q Do you consider that question to be a leading  
17 question?

18 MR. CROSS: Objection to form and foundation.

19 Go ahead.

20 A No. No, I consider that question to  
21 be fair and balanced. It begins by saying, "To  
22 the best of your knowledge," which is the way  
23 that I communicate. You may not know, and  
24 that's okay.

25 And I say, "Are or aren't," so I'm giving both

1 the positive and the negative, and then I finish with,  
2 "or don't you have an opinion about that," which gives  
3 the respondent another way out.

4 And if I'm not mistaken, half of the  
5 questionnaires used this wording and the other half used  
6 "aren't" or "Are any of these sparkling wines?"

7 I opened by saying, A, "You may not know the  
8 answer," and I'm saying the answer could be "Yes" or  
9 "No" or "No" or "Yes" or "Don't You Know?" What more do  
10 you want?

11 Q If you take a look at Kaplan Exhibit 2, which  
12 is Dr. Sabol's report and his study questions -- rather  
13 his survey questions, excuse me. And look at Question 3  
14 on his survey. Do you think that Question 3 is leading?

15 A Sometimes the problems with the  
16 question go beyond the words on the page. And  
17 the issue becomes one of what may precede it,  
18 what may not precede it.

19 Also, very importantly, the issue becomes one  
20 of controlling for noise or some suspected bias.  
21 Question 3, as I think I noted in my report, does say at  
22 the end, "You may answer 'Yes' or 'No' or 'Don't Know,'"   
23 which is not quite, I don't think, as good as saying  
24 would you think it was associated with, licensed by or  
25 owned by... Minor, but there are differences.

1           My issue with Question 3, as I said, extends  
2 beyond the wording of that question. It goes to the  
3 absence of what I would call Question 3A, and it goes to  
4 the inability of the researcher or anybody, for that  
5 matter, to extricate the noise, whatever the form of it  
6 is from that answer.

7           Q     If you look at Kaplan 1, which is a copy of  
8 your report, Paragraph 21. It's Page 6. As Paragraph  
9 21 goes on, and we'll talk about the ordering of the  
10 questions and not asking a follow-up "Why" question, but  
11 I notice the beginning of 21, you say Question 3 is,  
12 "Leading, suggestive and by itself inadequate to  
13 ascertain relevant confusion."

14           Putting aside the "Why" question not being  
15 asked, putting aside the ordering issues which you talk  
16 about in more detail, I'm just trying to get at is there  
17 a fundamental problem with the language in 3, aside from  
18 those issues that we need to address?

19           A     It's the question. You know, it's --  
20 I guess there are times when I feel more  
21 comfortable with open-ended questions. And I  
22 suspect that most of my colleagues would share  
23 my unease about Question 3.

24           And it's not -- I can't necessarily isolate a  
25 word or punctuation conceptually, especially absent some

1 type of control. It tends to be really suggestive, as I  
2 put it earlier. I would have -- and I haven't thought  
3 about how I would recast it because I wasn't asked to,  
4 and that takes up a lot of time, believe it or not. But  
5 in some manner, I would have structured this in a more  
6 open-ended way or given people more options or done  
7 something. It's not a good question. Does that help  
8 you?

9 Q It does. I'm just trying to make sure while  
10 we're talking today I cover it.

11 Maybe to sort of close that out, it tends to  
12 be suggestive. As you read it, what do you think it  
13 suggests?

14 A It really suggests to me a "Yes."

15 Q And would it be your position that it suggests  
16 a "Yes" because it is not more open-ended?

17 A That certainly would be helpful. You  
18 know, in part as a close-ended, it goes to the  
19 issue of "Why 'Yes,'" and one of the answers  
20 that you get from people when you ask not only  
21 this but other kinds of questions is well, if  
22 that wasn't the case, you wouldn't have asked  
23 me.

24 At a minimum, "Do you think" -- it should be,  
25 "Do you think it was associated with, licensed by or

1 owned by or in any way connected to Smart Balance? Do  
2 you think it's not associated with or licensed by or  
3 owned by or in any other way connected to Smart  
4 Balance?"

5 Some other things, open-ended. "Do you think  
6 it has an association? Is it licensed, owned by or in  
7 some way connected to another company? And what company  
8 might that be? Another brand. And what brand might  
9 that be? And what makes you say that?"

10 Those are different ways to ask the same  
11 question, and I tend to think those would be more  
12 consistent with, you know, what I see as generally  
13 accepted -- the generally accepted way to crack this or  
14 anything else.

15 Q And this issue that we have been discussing in  
16 terms of rephrasing to be a bit more open-ended or to  
17 provide more options is what you were getting at in the  
18 first sentence of Paragraph 21?

19 A That goes to the issue of leading and  
20 suggestive.

21 Q And is there any other --

22 A And that's relative to other ways one  
23 might cast this question.

24 Q Got you. Are there any other specific wording  
25 issues or problems you see with Question 3 that we



1 haven't talked about?

2 A Since we've agreed not to talk about,  
3 "Why do you say that," and since we agreed that  
4 we're not interested in the rest of the design  
5 of the study and everything else, that's --  
6 that's okay.

7 Q I just want to make sure I understand.

8 Okay. Looking at Page 7 of Kaplan 1, footnote  
9 7, which cites the ConAgra versus Hormel case, you were  
10 involved in this case, correct?

11 A That is correct.

12 Q In a nutshell, ConAgra has the Healthy Choice  
13 mark, and they sue Hormel for use of the Health  
14 Selections mark; is that right?

15 A Yes, that's what I remember.

16 Q So this case was a case dealing with  
17 likelihood of confusion of the word marks and not really  
18 the packaging and trade dress of the products. Is that  
19 your recollection, if you recall?

20 A Definitely the word marks. I'm not  
21 sure about -- there may have been -- that's a  
22 long time. There may have been some issues of  
23 color, maybe, but it was definitely around the  
24 word marks.

25 Q Let me sort of take it out of what it was and

1 ask it this way.

2 If it was a question of confusion of the word  
3 marks and not implicating trade dress, if someone had  
4 responded to your question, your ultimate question about  
5 likelihood of confusion, that they were confused because  
6 both products were green or both products were in a  
7 square box, would you weed those responses out?

8 A If they were not part of the issue  
9 being investigated, they would not count, that  
10 is correct. I would weed them out.

11 Q And in the hypothetical that we're talking  
12 about, if we're showing packaging and we're concerned  
13 about confusion of word marks, we would have to weed out  
14 aspects of the packaging that someone relied upon when  
15 they gave their "Why" response to likelihood of  
16 confusion. If we're interested in word mark confusion  
17 and someone says both products are in green boxes, we  
18 would weed that out because that should not be part of  
19 the consideration for likelihood of confusion?

20 A Yes.

21 Q In this case, where we don't have packaging,  
22 we just have the word marks, what would be the kinds of  
23 things that a consumer could even rely upon that would  
24 have to be weeded out when all they see are the word  
25 marks or hear the word marks?

1           A     You're asking me for the reasons a  
2     consumer gives an answer she gives. And as I  
3     indicated here, it's not uncommon -- and I'm  
4     sure your expert will confirm that -- every once  
5     in a while, you get somebody who says, "Well,  
6     they're all owned by the same company." You  
7     get -- one of the great concerns is you get  
8     people who say, "I was just guessing," even  
9     though you have -- it's okay to say "No."

10           And, of course, you have that segment out  
11    there that believes if they're asked a question, they're  
12    asked a question for a reason. See, that's why it's so  
13    much easier being a geologist. Rocks do not generate  
14    hypotheses.

15           So at a minimum, those are the most obvious  
16    reasons that people give you in my experience, and they  
17    write them down there.

18           Q     In your experience, how often in a survey do  
19    you get a response like, "I think the products are both  
20    owned by the same company"?

21           A     It depends.

22           MR. CROSS: Objection to form.

23           A     By the product category. And it will  
24    be from zero up to maybe 5 percent. That's  
25    really subjective.

1 Q Let me ask you a little bit of a different  
2 issue.

3 In your experience, how often do you get  
4 someone who responds by saying they were just guessing?

5 MR. CROSS: Objection to form.

6 A Anywhere from probably 2 to 10  
7 percent.

8 Q And for the last point that we raised about  
9 someone who thinks they're asked a question for a  
10 reason, how often do you get that as a response when you  
11 ask a "Why" question, in your experience?

12 MR. CROSS: The same objection.

13 A Zero to 3 or zero to 5 percent. I  
14 don't tally those. I just know that they don't  
15 count as confusion. But those are impressions.

16 Q I realize those are ballpark.

17 A Thank you.

18 Q Have you ever done any likelihood of confusion  
19 surveys in the frozen food market?

20 A Not that I can recollect now.

21 Q Did you do any study in this case of the  
22 frozen food market?

23 A Myself?

24 Q Yes?

25 A No, I did not.

1           Q     In your experience, how many people do you end  
2 up screening out of a survey because they work in  
3 marketing research or advertising or the industry that's  
4 the subject of the inquiry?

5           A     A trace. One or 2 percent.

6           Q     Do you find that people self-screen out in  
7 telephone surveys when they work in the industry by  
8 hanging up the phone?

9           A     That depends. If they're in the legal  
10 department of the industry and they get a sense  
11 of where you're going, they hang onto every  
12 word. I think people tend to be a little more  
13 interested when they're in the same industry. I  
14 myself, early on in the interview of phone  
15 interview or mall intercept, I'll make sure the  
16 interviewer knows that I'm in the business, and  
17 the interviewer will dispose of me accordingly.

18          Q     Including people who are in marketing research  
19 or advertising in the industry, though, has a de minimis  
20 effect on the results of the study, doesn't it?

21          A     Well, they're not going to be,  
22 fortunately -- they're not a large part of the  
23 population in general. But you see if you get a  
24 couple of people in a study, and I got a sample  
25 of a couple of hundred, then they clearly have a

1 disproportionate effect, not necessarily a big  
2 effect but they have a disproportionate -- can  
3 have a disproportionate effect on the outcome.  
4 And if we're talking about 20 percent confusion  
5 net of noise or 15 percent or one of those magic  
6 numbers, whatever they are, in this instance,  
7 then that -- boy, that can be a lot.

8 I'll tell you I have at least one colleague  
9 who doesn't believe in using any of those questions. He  
10 says -- he's a statistician. He says that's the way it  
11 is. And most of the time, he's going to be right, but  
12 every once in a while, and you don't know which time it  
13 is, he's got some people who are atypical and who may  
14 well be exerting a different -- an influence that is not  
15 consistent with the overall market in which their  
16 atypicality is minute. And we could end up with a value  
17 net of everything where their influence actually could  
18 be a factor. I don't want to take that chance.

19 MS. DICKSON: I'm about to start a new  
20 section. It's 5 to 12:00. How are you guys  
21 feeling? Do you need a break?

22 MR. CROSS: He needs a short break.

23 MS. DICKSON: Off the record.

24 (Discussion off the record.)

25 Q When you're studying consumer behavior, what's

1 the best predictor of future consumer behavior?

2 A The best predictor of future consumer  
3 behavior is what you tell me you're going to do.

4 Q Is it past behavior?

5 A What you tell me you're going to do.

6 Q It's intended behavior?

7 A Yes. Past behavior is pretty good,  
8 but for a variety of reasons, you may not follow  
9 through.

10 Q Isn't the same true of an intended behavior,  
11 though?

12 A It depends on when I ask you about  
13 your intention. My belief is intention  
14 incorporates in it past behavior.

15 Q Okay.

16 A As we talked about attributes of a  
17 brand and experience with the brand or  
18 competitive brands, the product category affects  
19 my perceptions and my beliefs, and those drive  
20 my behavior, those would influence my behavior.

21 Intention takes everything that's gone on  
22 before, adds what's happening now, and offers you a  
23 likelihood. I may have bought this -- something in the  
24 last ten days, and I may have had a God awful allergic  
25 reaction, a near-death experience, it just may have been

1 lousy. It just may be too expensive for my needs. A  
2 lot of things could happen.

3 The past purchase, past behavior issue is  
4 based on the notion that nothing bad happened between  
5 then and the next time. Obviously. So it's one we use  
6 all the time. A lot of people believe that behavior  
7 speaks more eloquently than intention.

8 Q Okay.

9 A For the reasons I said, I think one  
10 can make a very good argument that pure  
11 behavior, without other questions, has real  
12 shortcomings.

13 Q If you're interested in a consumer base that  
14 has experienced a particular market or has experienced a  
15 display or a particular service, in that instance, would  
16 you focus on past behavior as opposed to intended  
17 behavior?

18 A If I am interested in people broadly  
19 who have had a certain experience. Then that  
20 becomes a screening question. That is analogous  
21 to our A question, "Have you or anyone in your  
22 household purchased any frozen meals" or blah  
23 blah, "or have you personally purchased."

24 So those are screening criteria. Separate and  
25 distinct from, "Have you done it in the last 30 days or



1 are you likely to do it?"

2 So the answer to your question is yes, but or  
3 yes, and.

4 Q Okay. If you take a look at Kaplan 1,  
5 Paragraph 15, Page 5, the second sentence says, "There  
6 are two problems with this." And it goes on to say,  
7 "Past behavior is no guarantee of future intentions, and  
8 individuals who may not have purchased a frozen meal in  
9 the past 30 days but may be likely to do so in the  
10 future are excluded from the universe."

11 That's one of the problems that you're  
12 pointing out, correct?

13 A No.

14 Q Let me ask it more simply.

15 What are the two problems that you're  
16 referencing in Paragraph 15?

17 A First, "Past behavior is no guarantee  
18 of future intention."

19 And the second is, "People who don't have the  
20 past behavior haven't done something in the past 30  
21 days, may, for whatever reason, be likely to explore the  
22 category in the next 30."

23 So you have two issues. I think I could have  
24 used a comma. Maybe I shouldn't have a comma.

25 Q As to the second problem, which was, people

1 who don't have the behavior over the past 30 days may  
2 choose to explore the next 30 days and so should be  
3 included in the category. Isn't it possible that those  
4 individuals won't explore the category in the next 30  
5 days?

6 A Oh, sure.

7 Q Does their inclusion introduce a level of  
8 uncertainty in the study because you don't know how  
9 they're going to act?

10 A I've asked them what they intended to  
11 do, and they've told me they're likely to  
12 purchase. And their answers are to me as valid  
13 as the answers of those who have purchased in  
14 the past 30 days who say they are likely to do  
15 so. So they're both qualified, kind of my  
16 definition of the universe.

17 Q In Paragraph 15 in footnote 6, you cite, in  
18 another case, the Jordache Enterprises case. Do you see  
19 where I'm referencing?

20 A Yes, I do.

21 Q How did you come across that case?

22 A Jordache is a case that really is a  
23 good one for the shortcoming of just restricting  
24 yourself to past purchase. Some of my friends  
25 and I will share occasionally cases that seem to

1 point directly to a shortcoming or flag an  
2 evolution in the way our surveys are looked at.  
3 And that's one of them. And then I read -- and  
4 this is '93. This could have been in the  
5 reference guide, this could have been in  
6 McCarthy. I read the case somewhere back there,  
7 and my recollection was they were -- people were  
8 screened for purchases of jeans. This was a  
9 501, 301 --

10 Q 501?

11 A Something like that. So it fits.

12 Q There are a number of legal citations in your  
13 opinion. And some of the cases, as we already  
14 discussed, you have been involved in, and it sounds like  
15 some of these you talked to your colleagues and come  
16 across, either through discussions with them or through  
17 your own reading of articles and that type of thing.

18 Did you find any of these cases in a different  
19 mechanism or were they provided in a different mechanism  
20 other than what I just rattled off of these cases that  
21 are cited in this document?

22 A This is not the first critique. It's  
23 not my livelihood, but this is not the first  
24 time I have been asked to critique somebody  
25 else's work. And some of this -- some of the

1 shortcomings have been made by others. So some  
2 of this is in other critiques I may have.  
3 That's it. If you mean whether somebody  
4 referred me to cases? No.

5 Q When you do a survey, do you always use a  
6 control group?

7 A For litigation, especially when we're  
8 interested in causality, imputing something is  
9 the reason for or is likely to cause, yeah. I  
10 use a control.

11 Q Okay, that's fair.

12 Have you ever had to discount results from a  
13 survey that you have done based on results achieved  
14 through the use of a control?

15 A By discount, you mean adjust downward?

16 Q Throw out. There were some things that you  
17 have to start over because the control reveals a flaw in  
18 the survey? Let's maybe start there.

19 A More often than not, it's not a --  
20 it's not a starting over for me. I have to go  
21 back to the client and say that, after you apply  
22 the results of the control cell, we don't have a  
23 very high level of confusion.

24 Q Okay.

25 A And the answer is yes, that has

1 happened.

2 Q Is that unusual or is that something that  
3 happens more frequently than I'm guessing that it would  
4 probably happen?

5 A It doesn't happen that often because  
6 part of your responsibility is to say to the  
7 client to give them a judgment about whether  
8 there's something there or not. I'm not that  
9 good at prognosticating. If I was, I wouldn't  
10 be collecting data. So it's not that frequent,  
11 and that's why you do a pretest or a pilot also,  
12 so that you can learn early.

13 Q Does the mode of the survey influence your use  
14 of a control group? If you're doing a mall intercept  
15 survey versus a telephone survey versus the internet  
16 survey, does that impact?

17 A No.

18 Q You use it across the board?

19 A Of course.

20 Q In terms of the instances that you can recall  
21 where your control has revealed there's some issue,  
22 whether it's just low likelihood of confusion or some  
23 issue with the question, have you noticed that in  
24 relation to a particular mode of the survey? Does it  
25 happen more frequently with a telephone survey, a mall

1 intercept survey or an internet survey?

2 A Interesting. I have not looked at it  
3 that way, but my impression would be no. There  
4 is some choice of a modality beforehand.

5 Q Dr. Sabol did not use a control group?

6 A That's correct.

7 Q What impact on his survey results does not  
8 using a control group have, in your opinion?

9 A That's very hard to put this nicely.  
10 His results are meaningless and uninterpretable  
11 in the absence of a control group.

12 Q So you think they have zero value?

13 A I think they're meaningless and  
14 uninterpretable, and that's probably what it  
15 means, yeah.

16 MS. DICKSON: Bear with me one second.

17 Q Do you think it's common practice in  
18 conducting surveys for likelihood of confusion to use a  
19 control group?

20 MR. CROSS: Objection to form.

21 A Absolutely.

22 Q Would you be surprised to learn of cases where  
23 no control group was utilized but the results were still  
24 upheld?

25 A Cases that are current?

1 Q Yes, in litigation.

2 A I guess I would be surprised.

3 Q Are you aware of any instances where not using  
4 a control group is treated as more of a technical  
5 deficiency as opposed to a substantive concern?

6 MR. CROSS: Objection to form and foundation.

7 A I fail to see the distinction. No,  
8 I'm not. Could you help me?

9 Q What I mean by that is where a court will say  
10 it is a failing that does not render the results  
11 meaningless would be the technical deficiency, as  
12 opposed to a situation where the results themselves were  
13 deemed meaningless or worthless?

14 A If I say to you that I believe these  
15 results are meaningless, that's my  
16 interpretation as a person who does research and  
17 has internalized those standards. The court may  
18 not agree -- may find some value, okay. As  
19 distinct from what I said. That's their option,  
20 but I'm not -- I know of none, and I would be  
21 curious to see them. I really would like to  
22 educate myself about those. Maybe there's  
23 something I'm overlooking.

24 Q Well, let me ask it this way and take the  
25 court aspect out of it.

1           In terms of folks just in your profession,  
2 would you be surprised to learn that people do not  
3 routinely use control groups in their studies?

4           A     If they are trying to establish a  
5 causal link and they are -- maybe they can be  
6 used -- maybe they can use something else  
7 instead of a control group, but in the absence  
8 of a control, I would be surprised because my  
9 understanding is that in all science, medicine,  
10 whatever, when we try new drugs, anything, you  
11 need to control for extraneous variables, and if  
12 you don't do that, then I don't know how you  
13 interpret your results. You're smarter than me  
14 or you've got a lot of faith.

15          Q     If you don't use a control group, what other  
16 ways exist to control that would give you the confidence  
17 that you would look for in the survey results?

18          A     You could use what's called a control  
19 question, maybe. That's not the same. I  
20 honestly don't know what else you would use.

21          Q     Can you give me a for instance of what a  
22 control question would look like with Dr. Sabol's  
23 report?

24          A     No, not really. It's more likely to  
25 use that in a deceptive advertising case, I



1 think.

2 Q Just so I understand, a control group you  
3 essentially run the same survey?

4 A Everything.

5 Q And you changed something, though, like the  
6 Courtalino/Cristalino example?

7 A In the perfect world, you change only  
8 the variable in contention.

9 Q And then you would get the results from that  
10 group, so you would be able to tell if there was  
11 something strange going on?

12 A I would subtract the percentage of the  
13 people in that case that say there is some kind  
14 of relationship between Courtalino and Crystal  
15 because of the name. I would subtract that  
16 number, percentage from the percentage in the  
17 test cell would say there is a relationship to a  
18 Crystal and Courtalino because of the name.

19 Q And that would be the control group that we  
20 talked about?

21 A Yes.

22 Q For a control question, how would that work?

23 A Well, if it was a different study,  
24 let's say you're looking at -- I'm trying to  
25 think of one we did. You're looking at an ad,

1 and it makes some statements about the  
2 superiority of product, so in an interview, I  
3 would ask you what the ad meant or suggested, et  
4 cetera, and I would ask you if there were  
5 comparisons and would ask you if -- let's say  
6 the deceptive statement or the deceptive  
7 inferences lasted longer, I would ask you if it  
8 implied anything about durability lasting  
9 longer.

10 Then I would ask you whether it said something  
11 about cost, whether it cost more or less. Cost would be  
12 a control question, okay. And it says nothing about  
13 cost. A percent saying it says something about cost for  
14 whatever reason, it gets subtracted from the percent  
15 saying something about durability. It's not as good  
16 from my perspective. But in the absence of anything  
17 else, you need to be able to do something.

18 Q Take a look at Kaplan Exhibit 1, which is your  
19 report at paragraph 25. In this instance, you're  
20 accounting for people who were disqualified because they  
21 had not heard of Smart Ones?

22 A As per Question 1.

23 Q Yes. Do you make any account for folks who  
24 per question -- well, for screening or Screen B  
25 testified or responded that they didn't purchase frozen

1 food meals in the past 30 days or had not personally  
2 purchased frozen meals in the past 30 days?

3 A I agree with Dr. Sabol that Screen B  
4 is an appropriate screening questionnaire and  
5 that people -- so that I have -- unfortunately,  
6 we can't add the, "Are you likely," the purchase  
7 intention question.

8 But I can see where he is going with B and  
9 what he is using it for. And that is -- doesn't  
10 systematically exclude people. You could make an  
11 argument that people who haven't purchased a frozen meal  
12 from the frozen food section in the past month, past 30  
13 days really aren't part of this universe.

14 So there's no adjustment to be made, but I  
15 feel that based on my understanding of what a universe  
16 should be like, you can't make that same argument about  
17 not aware of Smart Ones.

18 Q Just so I understand the comment that you  
19 made, would it be your position that -- I think this is  
20 your position. That anyone who has an intention of  
21 purchasing frozen meals in the next 30 days should be  
22 included within the universe?

23 A Yes.

24 Q For folks who purchased for the past 30 days,  
25 is it your position that they should be in the universe

1 or should not?

2 A If he had done it the way I would have  
3 done it, that would not have impacted on my  
4 universe definition. My universe definition  
5 would have been likely to purchase in the next  
6 30 days in this instance, plus whatever else --  
7 plus the person who would buy such.

8 Q But we wouldn't have the group of past  
9 purchasers included in that universe; is that right?

10 A You don't necessarily have to have  
11 them.

12 Q If they had an intention to purchase within 30  
13 days, they would be pooled into how you're defining the  
14 universe?

15 A Say that again?

16 Q In your definition of the universe, it would  
17 be those intended to purchase in the next 30 days?

18 A Ideally.

19 Q Which may include people who have purchased in  
20 the past 30 days?

21 A That is correct.

22 Q And to the extent it does include those  
23 people, they are included within your definition of the  
24 universe which is based on the contention of consumers?

25 A Yes, they are.

1           Q     You would not separately include within the  
2 universe people who purchased frozen food meals in the  
3 past 30 days who did not express an intention to  
4 purchase in the future 30 days?

5           A     That is correct, I would not include  
6 those.

7           Q     So taking a look at the table on the top of  
8 Page 9, Dr. Sabol's report, the original calculation was  
9 at Page 12. Dr. Sabol's report is Kaplan Exhibit 2,  
10 it's table 4, just to have it in front of you. I'll let  
11 you get there.

12          A     I moved Dr. Sabol's numbers to the  
13 from "Report" column, and those numbers come  
14 from more than one place.

15          Q     The "Ever Purchased" and the "Purchased Most  
16 Often" are in different charts.

17          A     Different tables.

18          Q     So Dr. Sabol reported from 250 respondents on  
19 the likelihood of confusion question that 32 percent  
20 were likely to be confused, 39 percent were not likely  
21 to be confused and 29 percent didn't know. Is that  
22 correct?

23          A     Yes.

24          Q     And I think that translates into 80 people  
25 being confused of the 250, and then 97 or 98 not being

1 confused and 72 or 73 not knowing. I don't know which  
2 way the percentage broke because I didn't have the data?

3 A I don't know, I didn't make that  
4 calculation.

5 Q So in looking at your calculation, and Kaplan  
6 1, for the figure on confusion, you've taken the 54  
7 individuals who were disqualified because they had never  
8 heard of Smart Ones and assumed that they would say they  
9 were not confused?

10 A That is correct. For all three  
11 calculations, as I indicated in the couple of  
12 sentences above the table on Page 9 or in  
13 Paragraph 25, I added those 54 people who  
14 Dr. Sabol referenced to my denominator and then  
15 redid all the calculations. And I made an  
16 assumption that if they had no awareness of  
17 Smart Ones, they are unlikely to be confused,  
18 it's unlikely they ever purchased Smart Ones,  
19 and it's unlikely that they purchased Smart Ones  
20 most often. I applied the same decision rule to  
21 all three.

22 Q Let's take "Ever Purchased." Because they  
23 didn't have an awareness of Smart Ones, we would assume  
24 they never purchased the product, correct?

25 A Yes.

1 Q For "Purchased Most Often," again, because  
2 they don't have an awareness of Smart Ones, we would  
3 assume that they did not purchase it most often?

4 A Uh-huh.

5 Q For "Likelihood of Confusion," why would we  
6 assume a "No" as opposed to a "Don't know"?

7 A Actually, I stand corrected. I was  
8 not assuming a "Know" or a "Don't know." I was  
9 just assuming not a "Yes." Thank you, that was  
10 an error in what I said.

11 Q If you were trying to allocate those 54 people  
12 to a "Know" or "Don't Know," would you be able to do  
13 that? Is there a percentage within your field that  
14 would be utilized to do that?

15 A No, everything would be specific to  
16 the market.

17 Q So it would just be for purposes of these  
18 calculations assumed not a "Yes" for confusion?

19 A "Yes" is all that counts.

20 Q But it could be a "Don't know" or a "No"?

21 A That is correct, yes, I agree.

22 Q When someone responds on a likelihood of  
23 confusion survey that they don't know, do you think that  
24 that is indicative that there could be some likelihood  
25 of confusion?

1           A     I'm hoping that that means that they  
2     don't know whether there is or is not, and I've  
3     always accepted that as a legitimate and a valid  
4     answer, as valid as a "Yes" or a "No."

5           Q     Would you ever look at the number of people  
6     who responded "Don't Know" and suggest that that  
7     indicates there may be a likelihood of confusion?

8           A     It's a "Don't know," and I would hate  
9     to try to say that people who said "Don't Know"  
10    meant something else. I really would find that  
11    difficult.

12          Q     What if you had a situation where you ran a  
13    survey and 90 percent of the respondents said they don't  
14    know, would you be able to conclude from that that there  
15    is a likelihood of confusion?

16          A     That would be a very low number, and  
17    after I got through with the control -- well,  
18    let me back that up. So 90 percent say "Don't  
19    Know"?

20          Q     Uh-huh.

21          A     How many say "No"?

22          Q     Well, say it's evenly split, five and five.  
23    Five say "Yes, confusion," five say "No," and everybody  
24    else says "I don't know."

25          A     So it's 5 percent confusion, okay.



1 That goes to the wayfaring fool kind of  
2 argument. All I can tell you is assuming  
3 everything else is good and we have applied the  
4 appropriate control, I've got a 5 percent  
5 number. Now it's up to you guys and the judge  
6 or the jury to figure out whether that's an  
7 issue or not.

8 Q I guess what I'm trying to get at is all of  
9 the things, some things being equal, is there any  
10 independent value in seeing a high "Don't Know" number  
11 in doing a likelihood of confusion analysis?

12 A A high "Don't Know" number might  
13 suggest that there's something wrong with the  
14 questions. But in the hands of an experienced  
15 professional, pretty much following the  
16 generally recognized principles, which are  
17 fairly explicit in the likelihood of confusion,  
18 that's less likely to be the case. I think it  
19 reflects that you're asking a question that  
20 nobody has told people about or that they flat  
21 out don't care about. There's not much demand  
22 for people who have made -- try to make a  
23 livelihood out of "Don't Knows."

24 Q Let me ask you, taking a look at your chart  
25 and assuming that everyone would not be confused, so

1 would the -- the additional 54 folks would be a "No,  
2 there's no likelihood of confusion." That drops the  
3 percentage of confusion to 26 percent. Isn't that still  
4 a high likelihood of confusion in your experience?

5 A That number is without control.

6 Q Understood.

7 A And because of that, that number is  
8 meaningless and uninterpretable. I could have a  
9 confusion level of 20 percent that has net of  
10 noise that is more valid than the 26. I could  
11 have a 50, 60, whatever percent confusion in a  
12 test with a very large percent confusion of  
13 control, and I could have 60 percent test  
14 confusion and end up with 10 or 12.

15 So it's not a number -- I don't know that it  
16 intrinsically is a number to be looked at. One cannot  
17 overestimate the importance of a control in a study like  
18 this where we are trying to say the confusion is due to  
19 something.

20 Q If there had been a control in this study and  
21 you got to 26 percent confusion, would you consider that  
22 likelihood of confusion based on your experience?

23 A In the control or correcting for the  
24 control?

25 Q Correcting for the control.

1           A       That would be -- that would be  
2       confusion. That would be actionable confusion,  
3       I think, based on other situations I'm aware of,  
4       subject to the other issues that I believe are  
5       telling. There's, again, you know, to some  
6       degree, it's not a set of individual little  
7       things.

8                   We also have here the cumulative effect of a  
9       lot of things, I think. But to answer your question, 26  
10      percent net of control, everything else being legit, I  
11      would expect that whoever is making a determination  
12      would find that actionable based on what I have observed  
13      in other situations or been told.

14           Q       Take a look at Paragraph 26. This is on a  
15      question of aided awareness. I'm looking at the last  
16      sentence in 26, which reads, "Although I'm not familiar  
17      with the majority of the fame cases, I have never seen  
18      or heard of the results of an aided awareness question  
19      being used to support a claim of fame."

20                   Is it your opinion that an aided awareness  
21      question cannot be used to support a claim of fame?

22           A       No. I start this sentence by saying  
23      "Fame is not what I would regard as an area of  
24      expertise to the degree that I think I'm pretty  
25      good at likelihood of confusion, and I just

1 didn't know. And I haven't seen or heard of a  
2 fame claim being based on an aided awareness  
3 question, especially an aided awareness question  
4 where there wasn't a control. And by a control,  
5 I don't even need a control group. I need at a  
6 minimum, in Question 3 which -- Question 1,  
7 pardon me, which is what we are talking about,  
8 "Have you ever heard of," there should be  
9 something in there, another name, but a name --  
10 a credible name but not one that is a purveyor  
11 of frozen meals. So that I can get guessing out  
12 of that.

13 Q Just so I understand the scope of the opinion  
14 on 26, you haven't engaged in any exhaustive study to  
15 determine whether or not an aided awareness question can  
16 support a claim of fame?

17 A That is correct.

18 Q And you're not making the opinion that an  
19 aided awareness question cannot support a claim of fame?  
20 Rather, you're indicating you're not familiar with it?

21 A That is correct, yes. And that if one  
22 were to consider using such a question, then I  
23 believe there should have been a correction for  
24 yea-saying using a control brand.

25 Q Okay. But in Paragraph 26 relating to the

1 aided awareness question and Paragraph 27 on the aided  
2 "Ever purchased" question, we don't have a specific  
3 comment in the report indicating that a control group  
4 should have been used. Is that a fair statement, too?

5 A I would have put a control brand in  
6 there also. See, it's a little weirder because  
7 he uses a "Yes" in Smart Ones as something to  
8 get you in there, to get you into the rest of  
9 the interview.

10 If I had a control brand, a fictitious brand  
11 in Question 1, if you said, "No, I never heard of it,"  
12 but you said "Yes" to Smart Ones, then we would be going  
13 on to Question 2, and I have no business asking you if  
14 you ever purchased something you never heard of. So  
15 that's tougher. If you follow what I'm trying to say.

16 Q I do. I'm just saying within your report, the  
17 idea of a control group in relation to using aided  
18 awareness questions or aided "Ever purchased" questions  
19 isn't referenced; is that right?

20 A That's correct.

21 Q Let's take a look at Kaplan 2 on the survey  
22 questions that Dr. Sabol used. I'm looking at Question  
23 2, which reads, "Which of the following brands of frozen  
24 meals have you ever purchased?" And then there's a  
25 listing of six brands below that with a "Yes/No" option.

1           How does Question 2 enhance awareness of the  
2 Smart Ones brand?

3           A       I don't think question -- it does not  
4 enhance awareness, because there's nothing about  
5 awareness to enhance. You either are aware or  
6 you're not a part of the study. That's clear  
7 from Question 1 and the instruction that follows  
8 it. So it doesn't enhance awareness.

9           MS. DICKSON: All right. I'm at a breaking  
10 point.)

11           (Luncheon recess: 12:54 p.m.)  
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1 AFTERNOON SESSION

2 (Time resumed: 1:24 p.m.)

3 LEON B. KAPLAN, PH. D.,

4 having been previously sworn, resumed

5 EXAMINATION (Continued)

6 BY MS. DICKSON:

7 Q I think before our break, we were talking  
8 about Question 2. And in the Sabol survey, in your  
9 report, Dr. Kaplan, you suggested that reordering the  
10 questions would be important. Could you explain that  
11 opinion?

12 A Yes. It's simple common sense. I  
13 like to put -- I believe, and I think many  
14 others will concur, that you shouldn't really  
15 have anything that you don't need before your  
16 critical question series. I cannot -- Question  
17 2 and Question 4 and Question 5, among others,  
18 serve no purpose in terms of moving this toward  
19 the issue to be resolved.

20 Question 2, because I'm asking it, makes Smart  
21 Ones all that more legitimate and all that more real and  
22 all that more tangible. There's no reason to have it  
23 there. None at all. Actually, no reason to have it in  
24 the study.

25 Q In terms of likelihood of confusion?

1 A Yes.

2 Q Okay. Does the fact that there are screener  
3 questions that mention Smart Ones, in particular,  
4 Question 1 -- let me rephrase that.

5 The fact that there is a screener question --  
6 let me rephrase my rephrasing.

7 Question 1 specifically mentions Smart Ones in  
8 the listing of products. So, does that impact your  
9 opinion on whether or not 2 needs to come before 3 or  
10 can come after 3?

11 A Two just shouldn't be before 3,  
12 period. It does not advance the quest for  
13 accurate information in any way by having it  
14 before 3. It further makes Smart Balance a real  
15 something that should be in the supermarket.

16 Q You mean Smart Ones?

17 A Smart Ones, I apologize.

18 Q Okay.

19 A As does -- well, okay, yeah. There's  
20 no good reason to have it there.

21 Q What did you do to understand the Smart Ones  
22 brand prior to performing your critique?

23 A Could you --

24 Q What did you do to understand or familiarize  
25 yourself with the Smart Ones brand prior to performing



1 your critique?

2 A Nothing.

3 Q Is it your understanding that Heinz is the  
4 producer of Smart Ones?

5 A Yeah, I assume so.

6 Q And is it also your understanding that today  
7 Heinz and Weight Watchers International are separate  
8 companies?

9 A I don't know about that.

10 Q Is it your understanding that Weight Watchers  
11 International is an opposer in this trademark litigation  
12 or is a party in this trademark litigation?

13 A I think somehow I had the impression  
14 that they're involved on the Plaintiff's side,  
15 but I never dwelled on that.

16 Q In Paragraph 10 of Kaplan 1, your report, on  
17 Page 4, you note there's been a prior criticism of  
18 Weight Watchers' study?

19 A Uh-huh.

20 Q If Weight Watchers is not a party to this  
21 litigation, would that opinion have any import?

22 A That was in the context -- I forget  
23 where I got it. That was in the context of my  
24 belief that Weight Watchers was a part of all of  
25 this. I'm trying to figure out why I knew that

1 or why I believed that. No, I can't.

2 Q Okay. But that was your belief at the time  
3 that it was a party?

4 A Yeah.

5 Q Dr. Kaplan, how many hours have you spent on  
6 this case?

7 A Probably between 20 and 30.

8 Q Would those 20 to 30 hours be in the  
9 preparation of your critique?

10 A My critique is probably 20 to 25.  
11 There's a little leeway in that.

12 Q What tasks went into preparing your critique?  
13 How did you go about preparing your critique?

14 A I read the report and where I had  
15 questions, I tried to find some things that had  
16 addressed similar questions in the past. I read  
17 the report again, saw some additional things,  
18 tried to review those.

19 I read -- as I said Dr. Diamond's -- I looked  
20 at some of the standard references to see if my -- to  
21 make sure my beliefs, my impressions, my thoughts about  
22 what was the right way to do stuff was supported.

23 Q Have you discussed Dr. Sabol's report or the  
24 preparation of your critique with anyone?

25 MR. CROSS: Other than me.

1 Q Other than him?

2 A Oh, actually, no.

3 THE WITNESS: Thank you.

4 Q Has anyone other than you performed any work  
5 that is captured in part of this report, incorporated in  
6 it?

7 A No.

8 Q I think you already confirmed you have not  
9 done a study of the frozen food market or of any  
10 likelihood of confusion between Smart Ones and Smart  
11 Balance?

12 A That's correct, yes. I have not.

13 Q Do you know Dr. Sabol?

14 A No, I do not.

15 Q What did you need to understand about Smart  
16 Balance in order to perform your critique?

17 A That they were going to be -- there  
18 was an intention to move into this area. What I  
19 got really from the answers on the Notice of  
20 Opposition was helpful. That spelled out the  
21 kinds of products we were talking about, which  
22 was useful in terms of part of the assessment of  
23 universe. That's all.

24 Q Looking at Paragraph 4 of your critique, you  
25 have some sources, documents that you considered. Is

1     there anything else that you considered that is not  
2     listed on this list?

3           A     No. Assuming that we both understand  
4     cases cited means just the ones that are here.

5           Q     The ones in the report?

6           A     I have not gone beyond it. This is a  
7     lot.

8           Q     Have you looked at any deposition transcripts  
9     in this case?

10          A     No. The answers, that's all.

11          Q     Talking about -- we talked a little bit about  
12     this, but the Diamond article which is Exhibit --

13          A     4.

14          Q     Kaplan Exhibit number 4. I think you may have  
15     even referenced this when we first started talking about  
16     the article, but is it your understanding that Sherri  
17     Diamond's article is part of a larger publication by the  
18     Federal Judicial Center?

19          A     Yes.

20          Q     And that larger publication is entitled  
21     "Reference Manual on Scientific Evidence"?

22          A     Correct.

23          Q     And there are many other chapters that form  
24     that reference manual behind the guide on survey  
25     research that we have been referencing that was prepared

1 by Ms. Diamond?

2 A That is true.

3 Q Is it also your understanding that the  
4 reference guide is not intended to instruct judges  
5 concerning what evidence should be admissible or to  
6 establish minimum standards for acceptable scientific  
7 testimony?

8 A I have no idea.

9 Q Is it your understanding that if someone  
10 prepares a survey and does not do all of the steps  
11 identified by Ms. Diamond that that survey should be  
12 accorded no weight by a court of law?

13 A No.

14 Q Is it your understanding that Ms. Diamond's  
15 article is a guide of certain practices but not a  
16 required listing of something that must be contained in  
17 every survey for it to be viable?

18 A I hadn't thought about it, but that  
19 sounds reasonable.

20 Q Have you discussed this report with anyone  
21 from Leon Shapiro?

22 A Who.

23 Q From Leon Shapiro & Associates.

24 MR. CROSS: Leo.

25 Q I'm sorry, from Leo Shapiro?

1 A No.

2 Q Have you discussed this report with anyone by  
3 the name of Phillip Johnson?

4 A No.

5 Q Why don't you take a look in Kaplan Exhibit 1  
6 in your report, Paragraph 7.

7 A Yes.

8 Q And I'm looking at the last sentence of the  
9 quote from Professor Diamond, wherein she says, "some  
10 disputes may include all prospective and actual  
11 purchasers of Plaintiff's goods." Do you see where I'm  
12 referencing?

13 A Yes, I do.

14 Q When she says "actual purchasers," do you  
15 understand that to mean past purchasers?

16 A Yes.

17 Q And then prospective purchasers would be those  
18 having an intent to purchase?

19 A Yes.

20 Q And she indicates that a survey population, a  
21 relevant population, as she terms it may include  
22 prospective and actual; is that correct?

23 A That's correct.

24 Q She does not indicate that it must include  
25 prospective and actual purchasers?

1 A No, no.

2 Q Taking a look at Paragraph 6 of Kaplan Exhibit  
3 1, you reference the Manual for Complex Litigation,  
4 which is also prepared by the Federal Judicial Center;  
5 is that correct?

6 A That's correct.

7 Q And like the Diamond article, the cited  
8 portion of the Manual for Complex Litigation is a small  
9 piece of a much larger work?

10 A That's correct.

11 Q Would you agree that the Manual for Complex  
12 Litigation is not focused on likelihood of confusion  
13 surveys or analysis of brand strength?

14 A That is correct.

15 Q I'm going to show this to you. I'll see if we  
16 have to mark it. It's these two pages. If I can come  
17 over and show you where I'm looking.

18 In your report, you list out a number of  
19 factors that are relevant to admissibility and to  
20 validity, and those are repeated here. Would you agree  
21 that in terms of looking at the factors relevant to  
22 assessing admissibility of a survey, the manual  
23 indicates they need to be applied in light of a  
24 particular purpose for which the survey is offered?

25 A Oh, sure.

1 Q So that some of those factors could change  
2 depending on individual circumstances in a particular  
3 survey situation?

4 A To some degree.

5 MS. DICKSON: That's all I have for that. If  
6 you need us to mark it, we can.

7 MR. CROSS: No.

8 MS. DICKSON: Okay. What I would like to do  
9 is sort of my own little summary going through the  
10 headings that you have in your report and make sure  
11 we covered everything so I haven't missed any bases  
12 in terms of working through your report. I'm not  
13 trying to make you repeat everything, but I want to  
14 make sure I've covered everything.

15 Q So looking at -- well, I'm not going to  
16 reference your report, but this is, as I sort of work  
17 through -- and feel free to take a look at it. One of  
18 the issues you raise in your critique is a criticism of  
19 the population selection by Dr. Sabol?

20 A Correct.

21 Q And the basis of your criticism is that it is  
22 an underinclusive universe?

23 A Yes.

24 Q And it is underinclusive for what reasons?

25 A Because Dr. Sabol limits the universe



1 to those who indicated they were aware of, that  
2 is to say, ever heard of Smart Ones in his  
3 Question 1 primarily.

4 And secondarily, because he has not  
5 established contention and that's -- not established the  
6 next 30-day purchase contention of the category, not of  
7 Smart Ones but of frozen meals, et cetera.

8 Q Are there any other criticisms that you have  
9 as to Dr. Sabol's selection of the population that are  
10 not encompassed in those two bases for suggesting the  
11 universe underinclusive?

12 A Those are the reasons I have concerns  
13 about the universe.

14 Q Does your report assign a degree to which the  
15 underinclusiveness of the population impacts the  
16 studies, validity or viability or determination of  
17 likelihood of confusion?

18 A No, it does not.

19 Q The next category of criticisms pertain to the  
20 sampling procedure. What are the bases of your  
21 complaints or critique of Dr. Sabol's report that  
22 pertain to the sampling procedure?

23 A There are some questions that it is my  
24 opinion are pretty much always asked in  
25 screening for respondents to make sure that we

1 have not included people whose opinions would be  
2 atypical or who have a special knowledge in our  
3 sample. Because where they are in our sample,  
4 those individuals would be disproportionately --  
5 would occur at a higher incidence in our sample  
6 than in the larger population.

7 Q These would be the folks who have marketing  
8 experience, advertising experience or perhaps industry  
9 experience?

10 A And who have recently been interviewed  
11 on the subject.

12 Q Recent participants?

13 A Past participants, yes.

14 Q In Paragraph 16, you mention, "Population  
15 definition contaminates the sampling procedure."

16 How do you contend the population issues  
17 contaminate the sampling procedure?

18 A The population was defined by Question  
19 1 as people who have ever heard of, and so his  
20 definition was aware of, among other things,  
21 aware of Smart Ones. That was incorporated into  
22 the screening questionnaire, and so it  
23 compromises sampling, which is screening.

24 Q So aside from the two points that we just  
25 discussed under the sampling critique, are there any

1 other issues that you have with Dr. Sabol's sampling  
2 procedure?

3 A No.

4 Q And within your report, do you assign a degree  
5 to which the sampling issues that you just discussed  
6 impact the study's validity or viability?

7 A No.

8 Q The next category of the critique is  
9 "Questions and Methodology." You indicate in your  
10 critique that "Failing to ask why is improper," after  
11 Question No. 3.

12 A It's a very significant flaw.

13 Q Failure to use a control group?

14 A Very significant flaw.

15 Q In your critique, not using "Don't Know" for  
16 some of the options when you have "Yes" and "No" as a  
17 flaw?

18 A Minor, yes.

19 Q You indicated sequencing of the questions is  
20 an issue in that Question No. 2 should be after Question  
21 No. 3?

22 A That's correct.

23 Q And then the Question No. 3 is leading and  
24 suggestive, as briefly discussed and not being an  
25 open-ended question and having some issues with the

1 phrasing, as you previously identified?

2 A Correct.

3 Q Are there any other issues beyond what I just  
4 mentioned that you have with Dr. Sabol's questions and  
5 methodology?

6 A No.

7 Q Have you assigned a degree to which any of the  
8 issues you've identified in the "Questions and  
9 Methodology" section have impacted Dr. Sabol's study of  
10 validity or its viability?

11 A Well, I haven't necessarily assigned a  
12 value on a scale of 1 to 10, but I did say in  
13 Paragraph 22, "The design is not capable of  
14 answering the questions it was supposed to  
15 answer." So that says something. This would be  
16 the first sentence in Paragraph 22 on Page 7.

17 And, similarly, on Page 8, the first sentence  
18 in Paragraph 24 says, "Because of the absence of a  
19 control and the absence of the 'Why' question, so we are  
20 unable to know what's trademark relevant, the results  
21 are meaningless."

22 And while I haven't assigned a number from my  
23 perspective, as a person who has some competence in  
24 doing survey work, I don't think they have any value.

25 Q Putting aside the failure to ask the "Why"

1 question and the failure of not using a control group or  
2 control question for the other issues identified in the  
3 questions and methodology section of your critique, did  
4 you assign any degree to which those issue impacted the  
5 validity or viability of Dr. Sabol's report in your  
6 critique?

7 A I didn't assign any value.

8 Q And as we just discussed for --

9 A The absence of a control.

10 Q The absence of a control and the failure to  
11 ask the "Why" question, it would be your opinion those  
12 two flaws resulted in the survey having no value?

13 A We could not put any faith in his  
14 estimates of confusion.

15 Q And the section of your critique headed "Data  
16 Analysis and Reporting," you indicate that he did not  
17 include in the sample individuals who were not aware of  
18 the Smart Ones brand. That he utilized -- he,  
19 Dr. Sabol, utilized aided awareness questions, including  
20 aided awareness and aided "Ever purchased" questions as  
21 indicators of fame."

22 Are those issues that you had with Dr. Sabol's  
23 report that I just mentioned?

24 A Those are certainly issues with the  
25 report. The issue of adding the people who were

1 not aware really goes back to the universe  
2 definition, and it's how it manifest itself in  
3 his calculations.

4 And the aided awareness questions being used  
5 for attribution of fame, for what it is worth, I'm not  
6 familiar with any aided awareness questions being used  
7 to support fame, and the absence of a control group  
8 means we have potentially yea-saying with regard to  
9 "Ever heard of" or "Ever purchased Smart Ones," and we  
10 have no correction for noise.

11 Q Are there any other issues that you have with  
12 Dr. Sabol's report under the "Data Analysis and  
13 Reporting" section of your report that we have not just  
14 discussed?

15 A Not to my recollection, no.

16 Q Do you assign a value or degree to which the  
17 errors that you've identified in your critique and the  
18 "Data Analysis and Reporting" section that we just  
19 discussed impact Dr. Sabol's study's validity or its  
20 viability?

21 A Insofar as they reflect the absence of  
22 the control, which was addressed earlier, and it  
23 manifests itself in that then the comments about  
24 the meaninglessness because of there not being a  
25 control applied here.

1           Q     In the "Data Analysis and Reporting" section,  
2     at Paragraph 28, you have a comment about close-ended  
3     versus open-ended questions.

4                 Isn't it the case that open-ended questions or  
5     close-ended questions, one could be more appropriate  
6     than the other, depending on the types of information  
7     you're intending to elicit?

8           A     Yes, it is.

9           Q     So it wouldn't be fair to say an open-ended  
10    question is always better than a close-ended question?

11          A     If I had said that, I misspoke.

12          Q     I'm not saying you said that. I'm just saying  
13    it would not be for anyone to suggest that. Looking at  
14    Dr. Diamond's article at Page 253, and this is the  
15    paragraph right above D, the last sentence in that  
16    paragraph, she says, "Open-ended questions are more  
17    appropriate when the survey is attempting to gauge what  
18    comes first to a respondent's mind, but close-ended  
19    questions are more suitable for assessing choices  
20    between well-identified options or obtaining ratings on  
21    a clear set of alternatives."

22                 Do you agree with Dr. Diamond's statement?

23           MR. CROSS:  Objection to form.

24          A     As you pointed out before, these are  
25    general guidelines, and they really apply with

1 the caveat that everything else being perfect  
2 makes sense. I think that open-ended are less  
3 leading, I agree with that. They're more  
4 appropriate to gauge what comes first in a  
5 respondent's mind. I agree with that, among  
6 other things.

7 I don't quite know what she means about  
8 choices being -- well, would you prefer A or B,  
9 certainly one would have to go with close-ended to  
10 define the choice situations.

11 And with regard to obtaining ratings on a  
12 clear set of alternatives, what she means there is I'm  
13 going to say, "What do you think of this on cost, on  
14 quality of goods," et cetera. There are certain  
15 situations where open ends really have a clear  
16 superiority because the interviewer knows where he or  
17 she is going, and the respondent may not. Does that  
18 answer your question?

19 Q You did.

20 Do you think Question No. 3 on Dr. Sabol's  
21 survey is seeking opinion information?

22 A Oh, yeah. "Do you think it was  
23 associated with" -- in his second sentence --  
24 "Would you think Smart Balance was associated  
25 with, licensed by," et cetera.



1           In a general sense, "Do you think" is asking  
2     you for an opinion. There are other issues that go  
3     beyond the specific words, as we have talked about  
4     earlier.

5           Q     Understood. Looking back at your critique,  
6     towards the end of Paragraph 28, you also mention, "The  
7     questions do not contain a false answer to send a signal  
8     to respondents that not all of the answers are correct."

9           Do you assign any significance to the failure  
10    to include a false answer in terms of assessing the  
11    impact of not including a false answer to the validity  
12    of Dr. Sabol's study?

13          A     Easy for you to say.

14          Q     Not so easy for me to say.

15          A     I did not assign a value to that.  
16    However, as you can see, the absence of a false  
17    answer tells you that potentially everything I'm  
18    asking you about is true.

19                I'm asking you about some brands. You have  
20    heard of some, you haven't heard of some of the others.  
21    And then I'm asking, "Have you ever purchased only the  
22    brands you heard of?"

23                Then we have Question 3 and then whatever  
24    Question 4 means, of course it's after Question 3. So  
25    there's no reason to suspect that this interviewer does

1 anything other than speak the truth.

2 Q In the next section of your critique, entitled  
3 "Validation," you indicate that it is typical to  
4 validate some or all of the interviews in a study used  
5 for litigation.

6 A Yes.

7 Q Assuming, because it was not mentioned in  
8 Dr. Sabol's report that no validation occurred; is that  
9 correct?

10 A That's what it says. The report does  
11 not discuss validation. Someone cannot assume  
12 it was done.

13 Q If validation had been done, though, you would  
14 not have an issue beyond -- if validation had been done,  
15 do you have any other concerns under this heading beyond  
16 performing a validation as described in Paragraph 29?

17 A Validation done, I would like to know  
18 what he validated on, and then whether or not he  
19 removed the people who were adjudged to be  
20 invalid from his sample before he did his  
21 tabulations.

22 Q If you take a look at Paragraph 30, which is  
23 the summary paragraph of your critique, towards the  
24 bottom in the listing of the various mistakes you've  
25 identified in your critique, the last one you list is a

1 mischaracterization of some results. What does that  
2 refer to?

3 A Oh, that refers to the -- my one and  
4 only table. That refers to the table at the end  
5 of Paragraph 26 or that precedes Paragraph 27.

6 Q Is there anything referenced in Paragraph 30  
7 that we have not just discussed that you see as a  
8 problem with Dr. Sabol's report?

9 A I think you've done a very thorough  
10 job. No.

11 Q The last issue I'm going to ask you about, Dr.  
12 Diamond indicates in her article that, "Courts may draw  
13 a negative inference from the absence of a survey in  
14 support of one party's side."

15 Are you aware that courts sometimes draw  
16 negative inferences when a competing survey is not  
17 submitted?

18 A I've heard that, yes.

19 MS. DICKSON: That is all that I have. David,  
20 do you have any questions?

21 (Continued on next page.)  
22  
23  
24  
25

1 MR. CROSS: I don't have any questions. But I  
2 do ask that he have the right to read and sign.

3 (Time noted: 2:02 p.m.)

4 \_\_\_\_\_  
5 LEON B. KAPLAN, PH. D.

6 Subscribed and sworn to before me  
7 this \_\_\_\_\_ day of \_\_\_\_\_, 2012.

8 \_\_\_\_\_  
9 Notary Public

C E R T I F I C A T E

STATE OF NEW YORK )

ss.:

COUNTY OF NEW YORK )

I, DENISE L. DANIELS, a Shorthand Reporter and  
Notary Public within and for the State of New York, do  
hereby certify:

That I reported the proceedings in  
the within entitled matter, and that the  
within transcript is a true record of such  
proceedings.

I further certify that I am not  
related, by blood or marriage, to any of  
the parties in this matter and that I am  
in no way interested in the outcome of this  
matter.

IN WITNESS WHEREOF, I have hereunto  
set my hand this 9th day of May, 2012.

  
DENISE L. DANIELS

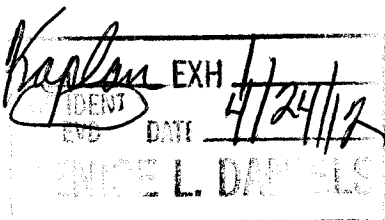
# **EXHIBIT E**

**Critique of Likelihood of Brand Confusion Between Smart Ones and  
Smart Balance Resulting from the Introduction of Smart Balance Frozen Meals**

by

Leon B. Kaplan, Ph.D.

1. I was asked by representatives of Quarles & Brady LLP, outside council for GFA Brands, Inc., the maker of Smart Balance branded products, to evaluate a study conducted by Barry A. Sabol, Ph.D. entitled "Likelihood of Brand Confusion Between Smart Ones and Smart Balance Resulting from the Introduction of Smart Balance Frozen Meals" (the study). The study was conducted on behalf of H.J. Heinz Company.
2. I have conducted marketing research surveys for over 40 years. I am the President and CEO of the Princeton Research & Consulting Center, Inc. (PRCC). I founded PRCC in 1979. Prior to that I was a Vice President at Opinion Research Corporation and before that a Research Psychologist in the Advertising Department of The DuPont Company. I have a BS in General Psychology from Brooklyn College, an MS and a Ph.D. in Consumer/Industrial Psychology from Purdue University, and an MBA from the Wharton School of the University of Pennsylvania. I have testified in intellectual property matters previously. See Exhibit A for my CV and a list of recent cases in which I was deposed or testified.
3. My work on this case is being billed at \$400 per hour.
4. In preparing this report I have considered the following documents:
  - Dr. Sabol's report.
  - The Manual for Complex Litigation, Fourth, Federal Judicial Center, 2004.
  - S. Diamond, *Reference Guide on Survey Research in Reference Manual on Scientific Evidence*, Second Edition, Federal Judicial Center, 2000.
  - J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, (September, 2007).



- Answers of GFA Brands, Inc. to Promark Brands, Inc.'s Notice of Opposition.
- The cases cited.

5. Dr. Sabol's study fails in numerous ways to meet the generally accepted standards for conducting research for litigation. As a result, I believe, its findings cannot be relied on in this matter.

6. To assist in evaluating the study I will refer to the guidelines found in *The Manual for Complex Litigation (Fourth)* prepared by the Federal Judicial Center (2004; at page 103). The four factors relevant to assessing the admissibility of a survey are:

- ✓ the population was properly chosen and defined;
- ✓ the sample chosen was representative of that population;
- ✓ the data gathered were accurately reported; and
- ✓ the data were analyzed in accordance with accepted statistical principles.

The factors relevant to assessing the validity of a survey are:

- ✓ whether the questions asked were clear and not leading;
- ✓ whether the survey was conducted by qualified persons following proper interviewing procedures; and
- ✓ whether the process was conducted so as to ensure objectivity (e.g., determine if the survey was conducted in anticipation of litigation and by persons connected with the parties or counsel or by persons aware of its purpose in the litigation).

I will address these factors and show how Dr. Sabol's study fails to meet most of them.



## Population

7. As Professor Diamond opined:

[The] target population consists of all elements (i.e., objects, individuals, or other social units) whose characteristics or perceptions the survey is intended to report. Thus, in trademark literature, the relevant population in some disputes may include all prospective and actual purchasers of plaintiff's goods and services and all prospective and actual of the defendant's goods and services.<sup>1</sup>

8. On the same subject, McCarthy wrote

The [population] is that segment ... whose perceptions and state of mind are relevant to the issues in this case.<sup>2</sup>

9. As stated on page ~~three~~<sup>one</sup> of the study:

The primary objective of this study was to determine the level of potential brand confusion, if any, which may occur from the introduction of Smart Brands frozen meals....

*Bence*

There are several errors relating to how the population, also referred to as the "universe", was defined. I will discuss them below.

10. A universe can be considered under-inclusive if it omits individuals whose states of mind are relevant to the legal issues being studied. The universe definition can be inferred from the questionnaire. Screen B and Question 1 established whether or not a person belongs to the universe and can participate in the study. A member of the universe had to have shopped for frozen meals in the past 30 days (Screen B) and be aware of Smart Ones (Question 1). To qualify, a person had to answer "yes" to Screen B, "Have you personally purchased any frozen meals from the frozen food section of the supermarket in the past month/30 days?" and say he or she had ever heard of Smart Ones in Question 1. This second requirement is why I believe the universe is under-

<sup>1</sup> S. Diamond, *Reference Guide on Survey Research in Reference Manual on Scientific Evidence*, p. 239.

<sup>2</sup> J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, (September, 2007) at §32-307.

inclusive. It is notable that this is not the first time this criticism has been raised in a study conducted for Weight Watchers.<sup>3</sup>

11. I believe a purchaser of frozen meals is a member of the relevant universe regardless of whether that individual is or is not aware of Smart Ones brand frozen meals. Unless Smart Ones has no desire to expand its base of customers, purchasers of other brands of frozen foods should be an important part of Smart Ones target market. In addition, nowhere in GFA's applications does it indicate that it intends to limit its target market to those who are aware of Smart Ones brand frozen meals. Therefore making awareness of Smart Ones a part of the definition of the universe is inappropriate. As used in the study, the definition is under-inclusive because it excluded frozen meal purchasers who were not aware of Smart Ones.

12. In discussing the under-inclusive universe, Diamond concludes:

...the survey's value depends on the extent to which the excluded population is likely to react differently from the included population.<sup>4</sup>

13. Page two of the report confirms the problem when it states that 18% of past 30 day frozen meal purchasers were disqualified from the interview because they were not aware of Smart Ones brand.

14. Later in the same section, Diamond referenced a likelihood-of-confusion case with similar universe problems. The plaintiff limited its survey to past users of its product. The court found this universe to be under-inclusive because it should have

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<sup>3</sup> Weight Watchers Int'l, Inc. v. Stouffer Corp., 74 F. Supp. 1259, 19 U.S.P.Q.2<sup>nd</sup> 291, 1321,1331 (S.D.N.Y. 1990).

<sup>4</sup> S. Diamond, *Reference Guide on Survey Research in Reference Manual on Scientific Evidence*, p. 241.

included users of other products in the category "so that the full range of potential customers for whom plaintiff and defendants would compete could be studied."<sup>5</sup>

15. Based on Screen B, the universe was also limited to past-30-day purchasers of frozen meals. There are two problems with this. Past behavior is no guarantee of future intentions and individuals who may not have purchased a frozen meal in the past 30 days but may be likely to do in the future are excluded from the universe. Courts have been increasingly critical of studies that do not screen for purchase intention.<sup>6</sup> Based on the above discussion, I believe the appropriate universe should have been expanded to include those likely to purchase a frozen meal in the next 30 days.

### **Sample**

16. The questions used to screen potential respondents define much of the sampling procedure for a study. As noted above, the population definition was seriously flawed and although that contaminates the sampling procedure it will not be discussed again here. There are other shortcomings with the sampling procedure:

17. The screening procedure also lacked several questions typically asked of respondents. It is common practice in studies to be used for litigation to screen for and exclude individuals who work in or live in households where anyone works in marketing research, advertising or the industries related to the subject of the inquiry (a company that prepares and/or distributes frozen foods and a company that retails prepared foods). It is equally common to ask about recent participation in a market research

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<sup>5</sup> S. Diamond, *Reference Guide on Survey Research in Reference Manual on Scientific Evidence*, p. 242.

<sup>6</sup> *Jordache Enterprises Inc. v. Levi Strauss Co.*, 841 F. Supp 506, 518, 30 U.S.P.Q.2d 1721 (S.D.N.Y. 1993).

study. Individuals having recent experience should be eliminated from further consideration for the study.

### **Questions and Methodology**

18. The issue of whether the questions were clear and not misleading requires a review of the entire questionnaire. As discussed above, the questionnaire had three screening questions, Screen A, Screen B and Question 1. It had one question that dealt with likelihood of confusion, Question 3. The other questions in the interview were not relevant to this matter. The questionnaire had problems with omissions in wording and in the sequence in which the questions were asked. They will be discussed below:

19. In litigation research a “don’t know” answer is a legitimate and valid answer. Since respondents often are reluctant to admit that they do not know an answer to a question, for fear of appearing uninformed, it is standard practice to tell respondents that it is acceptable if they don’t know the answer to a question. A statement such as “There are no right or wrong answers to my questions. If you do not know an answer, or you have no opinion for any question, simply say that you do not know or have no opinion and we will go on to the next question,” should always be included in a questionnaire. There was no statement of that type before Screen A. It would appear that Dr. Sabol was aware of the explicit need for a “don’t know” option because don’t know was offered as a legitimate response in Question 3.

20. Question 2 serves no purpose other than to try to enhance awareness of Smart Ones and if retained should have been moved to after the current Question 3.

21. Question 3 is leading, suggestive and, by itself, inadequate to ascertain relevant confusion. If a respondent answers Question 3 by saying “yes”, it is standard practice

and absolutely essential to follow up with a "Why do you say that?" type question. In a case involving trademark confusion, the only relevant confusion is trademark-related confusion.<sup>7</sup> That statement seems obvious. If confusion for any reason was accepted, then the percent confused would be improperly inflated. People whose confusion stemmed from non-trademark relevant beliefs would be counted as confused. ("I think one company makes all frozen meals." People who answered "yes" just because the question was asked would be counted as confused. ("If they weren't associated you wouldn't be asking the question.") People who guess would be counted as confused. ("Don't know, just a guess.") It is not possible to know how many of those classified as confused did not answered Question 3 "yes" for a trademark-relevant reason. McCarthy has commented on the necessity for this type of question.

Often, an examination of the respondent's verbatim responses to the 'why' question are the most illuminating and probative part of a survey, for they provide a window into consumer thought processes in a way that mere statistical data cannot.<sup>8</sup>

The problem of Question 3 being leading and suggestive is compounded by the failure to ask an open-end "why-" type question.

22. The study design used is not capable of satisfactorily answering the question it was supposed to answer, that is, what is the level of potential brand confusion that would be due to the introduction of Smart Balance frozen foods. Dr. Diamond discusses the problem at length.

Most surveys... are intended to show how a trademark...influences respondents' perceptions or understanding of a product.... The difficulty is that the consumer's response to any question on the survey may be the result of information or misinformation from sources other than the trademark the respondent is being shown.

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<sup>7</sup> ConAgra, Inc. v. Hormel & Co., 784 F. Supp. 700, 726 (D. Neb. 1992).

<sup>8</sup> J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, (September, 2007) at §32-356.

It is possible to adjust many survey designs so that causal inferences about the effect of a trademark...become clear and unambiguous. By adding an appropriate control the survey expert can test directly the influence of the stimulus.<sup>9</sup>

23. A Control Group is an additional group of respondents who met the same screening criteria and go through the same interview as the Test Group (those asked about Smart Balance) except they would have been asked in Question 3 about a different brand, one that was not alleged to infringe on the Smart Ones name. Any confusion observed in the Control Group would be attributed to noise and that percentage would be subtracted from the level of confusion observed in the Test Cell.<sup>10</sup> Since the study did not have a Control Group, it lacked a mechanism to estimate and adjust for "noise" or error in the data. Noise can take many forms, among them the interview experience itself, aspects of the questionnaire, guessing, etc. Noise would inflate the level of confusion measured in the Test Cell. Assuming everything else was acceptable, the resulting value would be the level of confusion, corrected for noise.
24. Absent a control group to correct for noise and a question the make sure confusion is due to trademark-relevant reasons, the results are completely meaningless. This has proven to be a factor in excluding studies in the past<sup>11</sup>.

### **Data Analysis and Reporting**

25. Due to the under-inclusiveness of the sample, the estimates in the report were inflated. On page 2 of the report it states that "...54 potential respondents were disqualified because they had never heard of Smart Ones...." This means that the base

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<sup>9</sup> S. Diamond, *Reference Guide on Survey Research in Reference Manual on Scientific Evidence*, p. 256-257.

<sup>10</sup> J. Jacoby, *Experimental Design and Selection of Controls in Trademark and Deceptive Advertising Surveys*, 92 Trademark Rptr. 890, 905 (2002).

<sup>11</sup> *National Football League Properties, Inc. v. Prostyle, Inc.*, 57 F.Supp. 2d 665, 668-70 (E.D. Wisc. 1998).

for further calculations should have been  $(250 + 54 =) 304$  not 250.<sup>12</sup> As the table below shows, this would reduce the statistics on Smart Ones.

	From Report	As corrected
Base=	(250)	(304)
	%	%
Confusion	32	26
Ever purchased	51	42
Purchased most often	10	8

26. On page 8 of the report, it states that "This (sic) data clearly qualifies Smart Ones as a "famous" brand." For support, Dr. Sabol relies on the results of the aided awareness question (Question 1). Although I am not familiar with the majority of the Fame cases, I have never seen or heard of the results of an aided awareness question being used to support a claim of fame.

27. On page 10, he uses the results of the aided ever-purchase question (Question 2) as the basis for saying that Smart Ones is a famous brand. I also have never seen or heard of the results of an aided ever-purchase question used to support a claim of fame.

28. In commenting about closed-ended versus open-ended questions, Dr. Diamond shows how closed-ended (aided) questions will produce bigger results than will open-ended (unaided) questions.

Most responses are less likely to be volunteered by respondents who are asked an open-ended question than they are to be chosen by respondents who are presented with a closed-ended question.<sup>13</sup>

<sup>12</sup> If the universe had also included potential purchasers, the base likely would have even been larger.

<sup>13</sup> S. Diamond, *Reference Guide on Survey Research in Reference Manual on Scientific Evidence*, p. 252.

That is why the distinction between open-ended versus closed-ended (unaided versus aided) questions is very important in this context. In addition, the questions do not contain a false answer to send a signal to respondents that not all of the answers are correct. In summary, claims about the famousness of the Smart Ones brand are meaningless because they are based on the wrong questions and not corrected for noise.

### **Validation**

29. Typically, an attempt is made to validate some or all of the interviews in a study used for litigation. This is done to demonstrate that the interviewer actually conducted the interview, that the interview was conducted properly and that the respondent was qualified to participate in the study. The report does not discuss validation so one can not assume it was done. Lack of validation calls into question the reliability of a study.<sup>14</sup>

### **SUMMARY**

30. As described above, this study has numerous shortcomings that keep it from meeting the minimum standards for an acceptable survey for litigation. There were mistakes with the population, sample, wording of questions, order of questions, omission of questions, lack of a control, failure to correct for noise and mischaracterization of some results. I believe the study does not have probative value in this matter.<sup>15</sup>



Leon B. Kaplan, Ph.D.

Date: 3/12/2012

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<sup>14</sup> Paco Sports, Ltd. V. Paco Rabanne Parfums, 86 F. Supp 2d 305, 54 U.S.P.Q2d 1205 (S.D. N.Y. 2000), judgment aff'd. 234 F.3d 1262 (2d Cir. 2000).

<sup>15</sup> Ralston Purina Co. v. Quaker Oats Co., 169 U.S.P.Q. 508, 1971 WL 16472 (T.T.A.B. 1971).



## **LEON B. KAPLAN, Ph.D**

### **EDUCATION**

- M.B.A.**        The Wharton School, University of Pennsylvania,  
**1979**        Philadelphia, Pennsylvania (Advanced Management Studies in  
Marketing, Strategic Planning, and Business Policy)
- Ph.D.**        Purdue University, Lafayette, Indiana (Major-  
**1971**        Consumer/Industrial Psychology; Minor-Social Research Methods and  
Personnel Selection) Dissertation: Predicting Consumer Preference  
Using a Two-Factor Attitudinal Model: An Experimental Test
- M.S.**        Purdue University, Lafayette, Indiana (Major-  
**1970**        General Industrial Psychology; Minor-Consumer Behavior, Psychological  
Measurement) Thesis: Differential Perceptions as a Source of Error in  
Concept Testing
- B.S.**        *Cum laude*, Brooklyn College, Brooklyn, New York  
**1966**        (Major-Psychology; Minor-Physics)

### **PROFESSIONAL EXPERIENCE**

- 1979 -**        President, Princeton Research & Consulting Center, Inc., Princeton, New  
**Present**        Jersey.
- 1975 - 1979**   Vice President, Custom Research Group, Opinion Research Corporation,  
Princeton, New Jersey.
- 1971 - 1975**   Senior Research Psychologist, Behavioral Research Group, Marketing  
Research Section, Advertising Department, E.I. duPont de Nemours and  
Company Inc., Wilmington, Delaware.
- 1971**        Post-Doctoral Research Fellow, Consumer Research Institute,  
Washington, D.C.
- 1969 - 1970**   Consultant to Proctor & Gamble Company, Cincinnati, Ohio, and the  
Pillsbury Company, Minneapolis, Minnesota.
- 1969**        Research Psychologist, Behavioral Research Group, Marketing Research  
Section, Advertising Department, E.I. duPont de Nemours and Company,  
Inc., Wilmington, Delaware.
- 1968**        Summer Intern Marketing Research Department, General Mills, Inc.,  
Minneapolis, Minnesota.
- 1966**        Interviewer, United States Public Health Services.

## **ACADEMIC EXPERIENCE**

- Oct. 2002      Guest Speaker, School of Business, Montclair State University, Upper Montclair, New Jersey. Lectured about surveys for litigation.
- 1971 - 1976    Adjunct Faculty, Graduate School of Business, University of Delaware, Newark, Delaware. Taught Consumer Behavior, Marketing Research, and Industrial Psychology.
- 1967 - 1970    Teaching Assistant, Department of Psychology, Purdue University, Lafayette, Indiana. Taught Consumer Psychology, Industrial Psychology, and Educational Psychology.

## **PAPERS AND SYMPOSIA**

- Kaplan, L.B.    Shopping for a Job: Recruiting College Graduates for the Private Sector. Paper presented at American Psychological Association's 97th Annual Convention, New Orleans, Louisiana, August 1989.
- Boren, M., & Kaplan, L.B.    Marketing Research - Strategies and Payoffs. Paper presented at Association of Science - Technology Center's Annual Convention, Boston, Massachusetts, October 1988.
- Kaplan, L.B.    Symposium Participant. On the Stand: The Role of Consumer Psychologists in Litigation. Presented at American Psychological Association 94th Annual Convention, Washington, D.C. August 1986.
- Kaplan, L.B.    Research: Key to Newspaper Change. Presented at Pennsylvania Associated Press Managing Editors Conference, Scranton, Pennsylvania, June 1986.
- Kaplan, L.B.    In Search of Profit Excellence. Presented at Adhesive and Sealant Council, Fall 1984 Seminar, Indianapolis, Indiana, October 1984.
- Kaplan, L.B.    Symposium Chairman. Theoretical & Empirical Issues in the Measurement of Trademark Infringement. Presented at American Psychological Association 91st Annual Convention, Anaheim, California, August 1983.
- Kaplan, L.B.    Symposium Chairman. Perspectives on the Consumer Psychologist in "The Real World". Presented at American Psychological Association 89th Annual Convention, Los Angeles, California, August 1981.
- Kaplan, L.B.    Symposium Chairman. The Consumer Psychologist and the Future. Presented at American Psychological Association 87th Annual Convention, New York. New York, September 1979.

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and Kaplan, L.B
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at American Psychological Associate 86th Annual Convention, Toronto,  
Ontario, Canada, September 1978.
- Kaplan, L.B., Components of Perceived Risk in Product Purchase: A Cross-Validation.  
Szybillo, G.J. *Journal of Applied Psychology*, 1974, 59, 298-291.  
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Research, University of Chicago, 1972, 382-393.
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Kaplan, L.B. affiliations: Responses to a Division 23 survey of its membership.  
Presented at the Business Meeting, Division 23, American Psychological  
Association 78th Annual Convention, Miami, Florida, September 1970.

Authored over 1,500 proprietary reports for clients.

## **AFFILIATIONS**

American Psychological Association  
Member, Opinion Survey Task Force, 1986

American Psychological Association--Division 23 (Consumer Psychology)  
Divisional Representative to American Psychological Association  
Council of Representatives, 1983-1986  
President, 1981-1982  
Chair, Election Committee, 1980  
Editor, Newsletter, 1978-1979  
Chair, Membership Committee, 1977  
Chair, Governmental Affairs and Public Policy Committee, 1975, 1973  
Chair, Program Committee, 1974

Member, American Psychological Society  
Member, American Psychology -Law Association  
Member, Marketing Research Association  
Psi Chi (National Psychology Honorary)  
Alpha Kappa Delta (National Sociology Honorary)

## **AWARDS**

Post-Doctoral Research Fellowship, Consumer Research Institute, Inc., 1971  
National Science Foundation Fellowship, 1970  
New York State Regents Scholarship, 1960-1966

## **REVIEWER**

Division of Consumer Psychology,  
Association for Consumer Research,  
*Journal of Applied Psychology*

## **DIRECTOR/BOARD MEMBER**

School Board, Lawrence Township Public Schools, Lawrence, New Jersey  
Member, 2004 to Present  
Vice President, 2007 to Present  
Chair, Negotiations Committee, 2007 to Present  
Chair, Personnel Committee, 2010 to Present  
Co-Chair, Community Relations & Legislative Affairs Committee, 2011 to Present  
Chair, Curriculum, Instruction, Assessment and Professional Development  
Committee, 2008 to 2010  
Chair, Facilities & Finances Committee, 2005 to 2006

New Jersey School Boards Association, Trenton, New Jersey  
Director, 2005 to 2011  
Member, Board of Directors Audit Committee, 2007 to 2011  
Chair, Board of Directors Audit Committee, 2010 to 2011

New Jersey School Boards Association Insurance Group, Burlington, New Jersey  
Trustee, 2009 to Present  
Vice Chair, Board of Trustees, 2011 to Present

## **DEPOSITIONS PAST FOUR YEARS**

Silicon Graphics, Inc. v. ATI Technologies ULC and Advanced Micro Devices, Inc.,  
USDC, Western District, Wisconsin, Civil Action No. 06-C-0611-C. Damages  
estimation. Conducted research for Defendant.

Champagne Louis Roederer (CLR) v. J. Garcia Carrion, S.A. and Friend Wine  
Marketing, Inc. d/b/a CIV US, Civil Action No. 06-213 JNE/SRN. Trademark  
infringement. Taken 3/17/8. Conducted research for Plaintiff.

American Association for Justice a/k/a Association of Trial Lawyers of America v.  
American Trial Lawyers Association, Inc. a/k/a The ATLA and J. Keith Givens.  
Civil File No. 07-cv-04626 JNE/JJG (USDC MN). Trademark Infringement.  
Taken July 15, 2009. Evaluated report of Plaintiff's expert.

Jamdat Mobile, Inc. v. Jamster International SARL Ltd., USDC, Central District,  
California, Case No. CV-05 3945 PA. Trademark infringement. Evaluated report  
of Plaintiff's expert. Replicated with different control.

## **TRIAL TESTIMONY PAST FOUR YEARS**

Champagne Louis Roederer (CLR) v. J. Garcia Carrion, S.A. and Friend Wine  
Marketing, Inc. d/b/a CIV US, Civil Action No. 06-213 JNE/SRN. Trademark  
infringement. Expert witness for Plaintiff.



Strategic  
Consumer  
Research  
inc

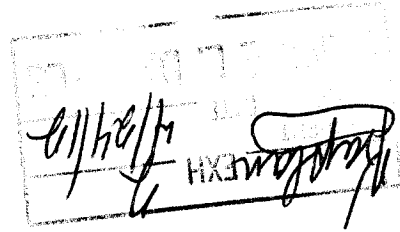
# H.J. Heinz Company

Likelihood of Brand Confusion  
Between Smart Ones and Smart Balance  
Resulting from the Introduction of  
Smart Balance Frozen Meals

A Brand Confusion Survey

December 2011

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Euclid Avenue  
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# Study Background and Objective

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- The Smart Ones brand of packaged frozen meals is sold nationally in the frozen food section of supermarkets.
- Recently, Smart Balance announced plans to sell packaged frozen meals under the brand name Smart Balance in the same frozen food section of supermarkets as where Smart Ones packaged meals are sold.
- The primary objective of this study was to determine the level of potential brand confusion, if any, which may occur from the introduction of Smart Balance frozen meals in the same frozen meal section of supermarkets where Smart Ones frozen meals are already sold.

# Study Method

The data comprising this study was collected using telephone survey research.

## Relevant Survey Universe

- To qualify for survey inclusion, a potential respondent had to meet two screening criteria:
  1. Had personally purchased any frozen meals from the frozen food section of a supermarket in the past 30 days.
    - and –
  2. Possessed at least nominal awareness of Smart Ones frozen meals as indicated by an affirmative response to the question – “Have you ever heard of the Smart Ones brand of frozen meals?”
- Thus, every survey respondent was a recent purchaser of frozen meals who possessed nominal awareness of the Smart Ones brand of frozen meals.
- A total of 216 potential respondents were disqualified because they did not purchase any frozen meals in the past 30 days (46% of all screened respondents).
- In addition, 54 potential respondents were disqualified because they had never heard of Smart Ones brand frozen meals (18% of past 30 day frozen meal purchasers).



# Study Method

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## Survey Sampling Plan

- This survey utilized a national (lower 48 states) replicate random sampling plan:
  1. Replicate random telephone samples were purchased from Survey Sampling, LLC, the premier sample generator firm in the United States.
  2. Each replicate random sample included both landline and cell phone telephone numbers in proportion to U.S. national rates of each in the general population.
- From these replicate random samples, potential respondents were screened to ensure that they met the criteria set for the relevant survey universe described earlier.

# Study Method

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## Survey Instrument

- The survey instrument used in this study was developed by Dr. Barry A. Sabol, President of Strategic Consumer Research, Inc. This questionnaire appears in Appendix A.

## Survey Execution

- This survey was conducted using the central telephone interviewing facility of Strategic Consumer Research, Inc. All interviews were conducted by experienced SCR, Inc. telephone interviewers.
- All interviewers were trained specifically for this survey by Dr. Barry A. Sabol. Interviewers were not made aware of the purpose of this study.
- All interviews were conducted from December 15-20, 2011. Weekday interviews were conducted from 5 p.m. to 9 p.m. and from Noon to 5 p.m. on Saturday in all U.S. time zones. No interviews were conducted on Sunday.

# Study Method

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## Level of Survey Precision

- A total of 250 interviews were conducted among qualified respondents who met the survey criteria. This sample size yields a maximum error rate of  $\pm 6.3\%$  at the 95% confidence interval.

# Summary of Study Findings

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This section is organized on a topic-by-topic basis.

## Aided Brand Awareness

- In the course of screening potential respondents, records were kept of those respondents who met the purchase requirement, but who were disqualified due to lack of awareness of the Smart Ones brand of frozen meals. This data, when combined with the qualified survey sample, made it possible to calculate the level of aided brand awareness for each of six brands measured in this study.

# Aided Brand Awareness

- Shown below in Table 1 are the aided brand awareness levels for the six brands included in this study as measured by affirmative responses to the “Have you ever heard of . . . ?” question.

**Table 1**  
**Total (Aided) Brand Awareness**

Brand	Aided Awareness Level (304) %
Lean Cuisine	90
Stouffer's	88
Healthy Choice	85
Swanson	85
Smart Ones	82
Marie Callender's	79

# Aided Brand Awareness

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- This data clearly indicates that the Smart Ones brand of frozen meals is very well known and comparable in aided awareness levels to all five of the other brands measured.
- This data clearly qualifies Smart Ones as a “famous” brand.

# Brand Purchase Rates

- The 250 qualified respondents who indicated awareness of the Smart Ones brand of frozen meals were asked “Which of the following brands of frozen meals have you ever purchased?” They were also asked on an unaided basis which brand of frozen meals they purchased most often.
- This data is shown below in Table 2.

**Table 2**  
**Brand Purchase Rates**

Brand	Ever Purchased (250) %	Purchase Most Often (250) %
Stouffer's	73	26
Lean Cuisine	73	18
Marie Callender's	62	16
Swanson	60	6
Healthy Choice	57	8
Smart Ones	51	10
Banquet	N/A	6
All others (19)	N/A	10

# Brand Purchase Rates

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- Overall, 51% reported having purchased the Smart Ones brand of frozen meals at some point in the past, and 10% reported having purchased Smart Ones brand frozen meals most often.
- These purchase rates are significant and add further evidence that Smart Ones frozen meals represent a “famous” brand.



# Past 30 Day Purchase Volume

- All qualified respondents were asked how many packages of frozen meals they had purchased in the past 30 days.
- The average number of packages purchased (mean value) in the past 30 days was 8.5, with a median value of 6 packages.
- Respondents were then classified as Light (1-5 packages), Medium (6-10 packages) or Heavy (11+ packages) users.
- This data is shown below in Table 3.

**Table 3**  
**Purchasing Volume Classification**

Purchase Volume Classification	Segment Size (250) %	Mean Package Volume
Light	45	3.2
Medium	33	8.3
Heavy	22	19.9
Total	100	8.5

# Level of Potential Brand Confusion

- All qualified respondents were asked:  
 “If you were to see a brand of frozen meals in the frozen food section of a supermarket named Smart Balance, would you think it was associated with, licensed by, owned by or in any way connected to Smart Ones? You may answer yes, no or don’t know.”
- Response data is shown below in Table 4.

**Table 4**  
Potential Brand Confusion

Likely to be Confused?	Total (250) %	Segment				
		Smart Ones Purchasers (128) %	Buy Smart Ones Most Often (24) %	Heavy Users (54) %	Med. Users (82) %	Light Users (114) %
Yes	32	38	42	37	33	29
No	39	43	46	50	40	33
Don't Know	29	19	12	13	27	38

# Level of Potential Brand Confusion

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- The level of potential brand confusion was found to be 32% for the total sample of respondents. This means that the actual level of potential brand confusion could be between 38% and 26% if all members of the relevant universe were surveyed.
- Levels of potential brand confusion were elevated for:
  - Smart Ones purchasers (38%)
  - Primary Smart Ones purchasers (42%)
  - Heavy frozen meal users (37%)
- This represents a significant level of potential brand confusion. Only 39% indicated no potential confusion, while 29% chose the “Don’t Know” response.

# Sample Demographics

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- Overall, 28% of respondents were male and 72% were female.
- The breakdown of respondent ages were as follows:
  - Under 35 (20%)
  - 35 – 54 (31%)
  - 55+ (49%)
- Interviews were conducted with respondents in 45 of 50 states.

The exceptions were:

- Wyoming
- West Virginia
- South Dakota
- Hawaii
- Alaska

# Study Conclusions

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- Two primary and relevant conclusions can be drawn from this study:
  1. Smart Ones is a well known, “famous” brand of frozen meals.
  2. There exists a significant likelihood of potential brand confusion between Smart Ones and Smart Balance if Smart Balance introduced frozen meals under the Smart Balance brand name into the frozen meal section of supermarkets.

## Appendix A: Survey Instrument

SMART ONES BRAND CONFUSION SURVEY

Good evening. My name is \_\_\_\_\_ from SCR, Inc., a national public opinion polling firm. Tonight we are conducting a survey about frozen meals sold in supermarkets and would like to include your opinions. We are not selling anything. This is strictly a survey which will take less than three minutes.

SCREEN A: First, have you or anyone in your household purchased any frozen meals from the frozen food section of a supermarket in the past month/30 days?

- 1 Yes (CONTINUE)  
-2 No (THANK AND TERMINATE)

SCREEN B: Have you personally purchased any frozen meals from the frozen food section of a supermarket in the past month/30 days?

- 1 Yes (CONTINUE)  
-2 No (ASK TO SPEAK TO PURCHASER - REPEAT INTRO)

1. Which of the following brands of frozen meals have you ever heard of:  
(READ LIST BELOW. CIRCLE ALL MENTIONED)

	Rotate Order	YES	NO
A.	Stouffer's	-1	-2
B.	Swanson	-1	-2
C.	Lean Cuisine	-1	-2
D.	Smart Ones	-1	-2
E.	Marie Callender's	-1	-2
F.	Healthy Choice	-1	-2

(IF HEARD OF SMART ONES - CONTINUE. IF NOT, THANK AND TERMINATE)

2. Which of the following brands of frozen meals have you ever purchased:  
(READ LIST BELOW. CIRCLE ALL MENTIONED)

	Rotate Order	YES	NO
A.	Stouffer's	-1	-2
B.	Swanson	-1	-2
C.	Lean Cuisine	-1	-2
D.	Smart Ones	-1	-2
E.	Marie Callender's	-1	-2
F.	Healthy Choice	-1	-2

3. If you were to see a brand of frozen meals in the frozen food section of a supermarket named Smart Balance, would you think it was associated with, licensed by, owned by or in any way connected to Smart Ones? You may answer yes, no or don't know.

- 1 Yes  
-2 No  
-3 Don't know

4. Which brand of frozen meals do you purchase most often? (DO NOT READ LIST. CIRCLE OR WRITE IN ONE BRAND ONLY)

- 1 Stouffer's  
-2 Swanson  
-3 Lean Cuisine  
-4 Smart Ones  
-5 Marie Callender's  
-6 Healthy Choice  
-7 Other (Specify) \_\_\_\_\_

5. In the past month, about how many packages of frozen meals of any brand have you purchased from the frozen food section of a supermarket?

\_\_\_\_\_  
(# Packages)

6. Finally, which of the following categories contains your age:

- 1 Under 35 -2 35 - 54 -3 55 or older

Thank you very much for your help tonight!

7. Interviewer, record gender: -1 Male -2 Female

8. Interviewer, record state: \_\_\_\_\_

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

Champagne Louis Roederer,

Plaintiff,

v.

J. Garcia Carrión, S.A.,  
and CIV USA,

Defendants.

Civil No. 06-213 (JNE/SRN)  
NON-CONFIDENTIAL FINDINGS  
OF FACT AND NON-  
CONFIDENTIAL CONCLUSIONS  
OF LAW

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Allen W. Hinderaker, Esq., John A. Clifford, Esq., and Heather J. Kliebenstein, Esq., Merchant & Gould P.C., appeared for Plaintiff Champagne Louis Roederer.

Peter J. Gleekel, Esq., Michael T. Olsen, Esq., and Bradley J. Walz, Esq., Winthrop & Weinstine, P.A., appeared for Defendants J. Garcia Carrión, S.A., and CIV USA.

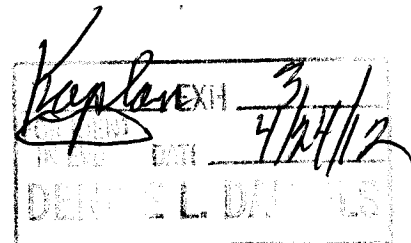
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This matter came before the Court for trial starting on February 10, 2010, and ending on February 24, 2010, to determine whether use of the name CRISTALINO on cava produced by J. Garcia Carrión, S.A., (Carrión) and imported by CIV USA, infringes or dilutes the CRISTAL trademarks of Champagne Louis Roederer (Roederer).<sup>1</sup> Based on the evidence received at trial, the Court makes the following Non-Confidential Findings of Fact and Non-Confidential Conclusions of Law.<sup>2</sup>

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<sup>1</sup> Roederer filed suit on January 13, 2006. On July 23, 2008, the Court granted the motion for summary judgment of Carrión and CIV USA (collectively, Defendants) on the ground that Roederer's claims were barred by laches. The United States Court of Appeals for the Eighth Circuit reversed that decision and remanded for further proceedings on June 24, 2009. *Champagne Louis Roederer v. J. Garcia Carrión, S.A.*, 569 F.3d 855 (8th Cir. 2009).

<sup>2</sup> The Non-Confidential Findings of Fact and Non-Confidential Conclusions of Law consist of redacted Findings of Fact and Conclusions of Law [Docket No. 327]. Redactions are denoted by \* \* \*.





## **NON-CONFIDENTIAL FINDINGS OF FACT**

### **I. Sparkling wine**

1. Still wine, or wine without bubbles, is made by a fermentation process that converts grape sugar into alcohol and carbon dioxide. The carbon dioxide in still wine is released by the wine producer after fermentation.

2. Sparkling wine, or wine with bubbles, is made using a second fermentation process that converts still wine into sparkling wine. According to the traditional method, also known as the “Method Champenoise” or “champagne method,” the second fermentation occurs in the bottle in which the sparkling wine is sold. The carbon dioxide is trapped in the bottle, dissolves into the wine, and escapes as bubbles when the sparkling wine is released from the bottle. According to the alternative “bulk” or “Charmat” method, the second fermentation takes place in a large tank or vat. After the second fermentation is complete, the contents of the tank are pumped into bottles for sale. The traditional method of producing sparkling wine results in higher-quality wine than the Charmat method.

3. Champagne and cava are both sparkling wines. When used properly, the term “champagne” denotes a sparkling wine made according to the traditional method from grapes grown in the Champagne region of France. A vintage champagne is made from grapes of the same year’s harvest. A non-vintage champagne is made from grapes of different years’ harvests. The term “cava” denotes a sparkling wine made in the Catalonia region of Spain.

### **II. The U.S. sparkling wine market**

4. The United States has a three-tier distribution system for alcohol, including wine. According to this system, a foreign wine producer sells wine to an importer. The importer then sells the wine to retailers, which are typically hotels, restaurants, and liquor stores. The retailers

sell the wine to the consumer. Each tier sets its own price for the wine. Wine producers are prohibited by law from communicating directly with or selling directly to consumers, but an importer may communicate with its distribution network, including retailers.

5. The size of the U.S. sparkling wine market was relatively constant between 1995 and 2006. With the exception of 1999, sparkling wine consumption between 1995 and 2006 varied between 11.8 and 13.3 million cases. In 1999, sparkling wine consumption increased to 15.7 million cases due to the millennium celebration. The sparkling wine market peaks in May, June, November, and December because large numbers of celebratory events, including graduations, weddings, and holidays, occur during those months.

6. Most consumers who purchase wine, including sparkling wine, in liquor stores have only a cursory knowledge of wine. Despite the efforts of champagne producers to educate consumers about the differences between champagne and other sparkling wines, consumers continue to receive mixed messages about the meaning of “champagne” because some sparkling wines made outside the Champagne region of France identify themselves as “champagne.” Consequently, many consumers do not distinguish between champagne and other sparkling wines.

7. Consumers generally enter liquor stores with a price point and type of wine in mind. It is unusual for a consumer to purchase a wine at a price significantly different from the original price point. When inexperienced consumers purchase a more-expensive product, they educate themselves about the product by asking the retailers questions. Consumers who purchase less-expensive bottles of wine ask fewer questions, although some will ask for guidance or discuss the wine regardless of price.

8. Many consumers purchase sparkling wine at different price points depending on the reason for the purchase. Consumers commonly purchase a less-expensive sparkling wine for large gatherings and a more-expensive sparkling wine for special occasions such as anniversaries, weddings, birthdays, and New Year's Eve. In addition, consumers purchasing sparkling wine for a wedding reception may economize by purchasing a more-expensive sparkling wine for the wedding party and a less-expensive sparkling wine for the guests.

9. When purchasing wine in liquor stores, consumers are often hurried and make impulse purchases. They look for a wine they are familiar with based on prior consumption, advertising, newspaper or magazine articles, or word-of-mouth. Consumers rely on several cues when selecting a wine, including the name of the wine, the color of and fonts used on the labels, and the shape of the bottles.

10. Because consumers rely on labels, it is a common practice for a prestigious French winery to inform consumers of an affiliation or association between a less-expensive product and the winery by including the winery's name or a portion of it on the front label of the less-expensive product. Moet & Chandon, which produces DOM PERIGNON champagne, labels its California sparkling wines with the name "CHANDON." G.H. Mumm, which also produces a high-quality champagne, labels its California sparkling wines with "MUMM NAPA." Chateau Mouton-Rothschild, which produces a Bordeaux wine that sells for approximately \$200 a bottle, labels its less-expensive wines MOUTON-CADET. The similarity in the names informs consumers of the connection between the less-expensive product and the French winery.

11. The vast majority of sparkling wine is sold in green bottles that have concave bases. The front labels on most bottles of sparkling wine do not have gold as the background

color.<sup>3</sup> Rather, the background color can be one of any number of colors, including white, cream, black, yellow, red, brown, and blue. Many front labels include a distinguishing feature, such as a ribbon, stripe, or picture, in a contrasting color. Most front labels prominently display the winery's name. It is common for rosé sparkling wines to have a pink front label, and a few rosé sparkling wines have a pink-hued copper front label. Gold neck labels with a medallion on the front of the label are extremely common in the sparkling wine market, and many of the neck labels extend downwardly to accommodate the medallion. The medallions vary from an elaborate shield or crest to a circle identifying the winery or the sweetness of the sparkling wine. It is common for the neck labels to have a stripe or ribbon in a different color at the base. "Shoulder labels," or labels located between the front and neck labels, are rare.

### **III. The parties and their products**

#### **A. *Champagne Louis Roederer***

12. Roederer is a French company headquartered in Reims, which is in the Champagne region of France. Roederer is a family-owned business that was founded in 1776 by Nicolas Henri Schreider, the uncle of Louis Roederer. Louis Roederer took ownership of the company in 1826, at which time the company's name changed to Champagne Louis Roederer. Jean-Claude Rouzaud, a member of the Roederer family, is the president of Roederer's board of directors and its former chief executive officer. Members of the Roederer family make up the

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<sup>3</sup> Defendants' expert Gonzalo Brujo testified that "the majority of the colors in the wine industry are goldish, are plate, and they're kind of brilliant colors." In his expert report, he opined that "[m]etallic gold (although different golds) is the color of choice for the majority of players in the Champagne and Sparkling Wine segment." However, the majority of the sparkling wine labels depicted in Exhibit 1 to his expert report are not gold. For example, the VEUVE CLIQUOT label is orange, the MARTINI & ROSSI label is silver, the MOET & CHANDON label is cream, and the FREIXENET and GLORIA FERRER labels are black with gold print. The Court finds Brujo's opinion that the majority of front labels in the sparkling wine segment are metallic gold is not credible.

remainder of the board. In January 2006, Frederic Rouzaud, Jean-Claude Rouzaud's son, became the chief executive officer and general manager of Roederer. Roederer employs between 140 and 150 people on a year-round basis and an additional 600 people during the two-week harvest season.

13. Roederer owns a winery located in Reims where it produces vintage champagnes under the names CRISTAL and CRISTAL ROSÉ. CRISTAL champagne was first produced in 1876 at the request of Tsar Alexander II of Russia. According to Roederer tradition, the champagne was named "CRISTAL" because it was sent to Tsar Alexander II in crystal bottles.

14. The size of Roederer's vineyards and the quality of each year's grape harvest limits Roederer's production of CRISTAL champagne. Roederer only uses grapes from its own vineyards, and if the grapes in a year's harvest are below the standard required for CRISTAL champagne, Roederer does not produce CRISTAL champagne that year. The quality of CRISTAL champagne is enhanced by various wine-making practices, including harvesting the grapes by hand and aging the wine for six years in oak casks.

15. \* \* \*. In 1995, Roederer sold \* \* \* bottles of CRISTAL champagne in the United States. Roederer sold \* \* \* bottles and \* \* \* bottles in the United States in 2000 and 2004, respectively. With the exception of 2009, the demand for CRISTAL champagne has always exceeded its supply. An economic downturn caused the decreased demand for CRISTAL champagne in 2009.

16. Liquor stores typically sell CRISTAL champagne for between \$200 and \$280 per bottle. Restaurants, hotels, and nightclubs generally sell CRISTAL champagne for between \$300 and \$700 per bottle.

17. Roederer produces other champagnes, including BRUT PREMIER, BRUT VINTAGE, ROSÉ VINTAGE, and BLANC DE BLANCS champagne. CRISTAL and BRUT PREMIER champagne make up about 20% and 75% of Roederer's champagne production, respectively. Roederer's other champagne products account for the remainder. BRUT PREMIER champagne sells for between \$40 and \$50 per bottle in liquor stores and BRUT VINTAGE champagne sells for about \$75 per bottle in liquor stores.

18. Roederer also owns the Roederer Estate winery in California's Anderson Valley, which it purchased in 1981 because there was no room to expand in the Champagne region of France. Roederer selected the Roederer Estate vineyards in the Anderson Valley because the "terroir," or microclimate, resembled that of the Champagne region. It presents Roederer Estate as "the California out-post of Champagne Louis Roederer" and chose the name "Roederer Estate" to increase the success of its California sparkling wines by linking them to the Roederer name. Roederer considered using the name "CRISTALINO" for its Roederer Estate products, but decided against it because Jean-Claude Rouzaud believed it would dilute the image of CRISTAL champagne.

19. Roederer Estate produced its first wines in 1988. The Roederer Estate winery produces ROEDERER ESTATE BRUT and ROEDERER ESTATE BRUT ROSÉ sparkling wine, along with ROEDERER ESTATE L'ERMITAGE and ROEDERER ESTATE L'ERMITAGE ROSÉ "prestige" sparkling wine. Roederer does not identify its Roederer Estate sparkling wines as "champagne" because they are made from grapes grown in California, not the Champagne region of France. A bottle of ROEDERER ESTATE sparkling wine sells for about \$20 in liquor stores. Roederer sold \* \* \* cases of ROEDERER ESTATE sparkling wine in 2007 and expects sales to increase to \* \* \* cases by 2012.

20. About six years ago, Roederer acquired the Scharffenberger Cellars winery, which is also located in the Anderson Valley. Scharffenberger Cellars sparkling wines are made using a different method and have a different “style” than Roederer and Roederer Estate wines. Roederer does not promote any connection between Scharffenberger Cellars wines and Roederer.

21. Maisons, Marques & Domaines (MMD) is the importer and distributor for Roederer in the United States. Roederer owns approximately 95% of MMD and MMD management owns the remainder. MMD represents twenty-six wine producers, half of which Roederer owns.

***B. Defendants***

22. Carrión is a Spanish corporation that produces and markets wines and fruit juices. In 2009, Carrión made 800 million liters of juice and wine, about 60% of which were juice and 40% were wine. Priesca, S.A., owns Carrión’s stock. The Garcia-Carrión family owns 75% of Priesca’s stock and local banks own the remaining 25%.

23. In April 1997, Priesca purchased the stock of Jaume Serra, S.A., a Spanish winery founded in 1943. In August 1998, Jaume Serra merged with Carrión. The merged entity operates under the name “J. Garcia Carrión.”

24. The Jaume Serra winery, which is located in Vilanova y la Geltru, Spain, produces still wines and cava. Jaume Serra produced a still wine under the name CRISTALINO in the 1950’s and another still wine under the name CRISTALINO in 1979. Jaume Serra began selling cava under the name CRISTALINO some time before 1987. Carrión currently sells cava under the name CRISTALINO and the name JAUME SERRA. CRISTALINO cava is made according to the traditional method and is aged at least eighteen months before sale. Bottles of Carrión’s cava are not labeled until shortly before they leave the winery.

25. In connection with the 1997 merger, Carrión upgraded the Jaume Serra winery to expand its capacity and decrease production costs. The upgrade included installing a new wine cellar, new lines, and new production robots. This upgrade did not change the manufacturing process for CRISTALINO cava.

26. Jaume Serra began importing CRISTALINO cava into the United States in 1989. In 1992, Jaume Serra sold just over 10,000 bottles of CRISTALINO cava in the United States. In 1997, 384,864 bottles of CRISTALINO cava were sold in the United States, which increased to 689,076 bottles in 2000. In 2004, Carrión sold just over 2 million bottles of CRISTALINO cava in the United States, and by 2009, Carrión's U.S. sales had increased to slightly over 4 million bottles. Carrión's sales of CRISTALINO cava in the United States make up 90% of its U.S. wine sales. Between 75% and 80% of CRISTALINO cava sold in the United States is CRISTALINO BRUT. In 2002, Carrión began selling significant amounts of CRISTALINO ROSÉ cava in the United States.<sup>4</sup> CRISTALINO cava typically sells for between \$8 and \$10 per bottle in liquor stores and between \$19 and \$32 per bottle in restaurants. Defendants have maintained the price of CRISTALINO cava at no more than \$10 per bottle in liquor stores for several years, despite inflation and an unfavorable exchange rate.

27. CIV USA, Inc., is a consortium of Spanish wineries that promotes and distributes Spanish wines in the United States. Jaume Serra joined CIV USA in 1991. Also in 1991, Friend Wine Marketing d/b/a CIV USA was incorporated to facilitate the process of obtaining an import license from the U.S. Bureau of Alcohol, Tobacco, and Firearms (BATF). Vince Friend is the president and sole shareholder of Friend Wine Marketing. Carrión took Jaume Serra's place in CIV USA after the 1997 merger.

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<sup>4</sup> The testimony at trial indicated that only a few cases of CRISTALINO ROSÉ cava were sold in the United States before 2002.



#### **IV. Trademarks**

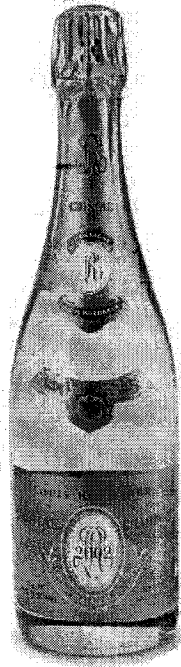
##### ***A. Roederer's marks***

28. Roederer owns U.S. Trademark Registration No. 662,343 for CRISTAL CHAMPAGNE & Design for use in connection with champagne. The '343 mark was registered on the Principal Register on May 27, 1958. Roederer disclaimed the words "CRISTAL CHAMPAGNE" apart from the mark as shown in the registration.

29. Roederer also owns U.S. Trademark Registration No. 1,163,998 for the word mark CRISTAL CHAMPAGNE for use in connection with champagne. The '998 mark was registered on the Principal Register on August 4, 1981 under Section 2(f) of the Lanham Act, 15 U.S.C. § 1052 (2006). Roederer disclaimed the word "CHAMPAGNE" separate and apart from the mark as shown. Roederer filed an affidavit of incontestability for the '998 mark in 1987, which the U.S. Patent & Trademark Office accepted in 1989.

30. The '998 and '343 marks have dates of first use in commerce of March 25, 1937. In 1948, Roederer sold \* \* \* bottles of CRISTAL champagne in the United States, and sales have occurred continuously since that date. Sales of CRISTAL champagne in the United States increased from \* \* \* bottles in 1960 to \* \* \* bottles in 1969. Roederer sold \* \* \* bottles of CRISTAL champagne in the United States in 1979 and \* \* \* bottles in the United States in 1989. In 2004, Roederer sold \* \* \* bottles of CRISTAL champagne in the United States. Roederer has continuously used in commerce the CRISTAL mark in connection with champagne in the United States since at least 1948.

31. The appearance of bottles of CRISTAL champagne has not significantly changed since CRISTAL champagne's creation in 1876. The following image depicts a present-day bottle of CRISTAL champagne.



32. The bottle is clear and, unlike most other sparkling wine bottles, has a flat base. The front label is rectangular, gold, and features a large white “LR” medallion on its center with a stylized design of white curved lines underneath the medallion. The vintage year is printed in maroon over the LR medallion. “CRISTAL®” appears on the upper left side of the LR medallion and “CHAMPAGNE” appears on the upper right side of the LR medallion, both printed in a maroon Roman serif font. “CRISTAL®” is printed in white beneath the LR medallion and “LOUIS ROEDERER” is printed in maroon above the LR medallion. “BRUT” is printed in maroon on the bottom left of the LR medallion, and the volume and percent alcohol by volume is printed in maroon beneath “BRUT.” “REIMS” and “PRODUCT OF FRANCE” are printed in maroon on the bottom right of the LR medallion.

33. A gold shoulder label depicts the Imperial coat of arms flanked on both sides by the initials “L.O.R.” in maroon. Gold engraving circumscribes the shield and the initials.

34. The neck label is gold. A smaller white LR medallion is located on the front and “CHAMPAGNE” is printed above the small LR medallion in white on a maroon ribbon. “LOUIS ROEDERER” is printed underneath the small LR medallion, also in white on a maroon ribbon. The smaller LR medallion and LOUIS ROEDERER are located in a downwardly-extending portion of the neck label. “CRISTAL” is horizontally embossed in maroon above the smaller LR medallion. An LR monogram is embossed in maroon above the word “CRISTAL.” The word “CRISTAL®” is also printed in maroon on both sides of the neck label approximately parallel to the smaller LR medallion and printed in white beneath the smaller LR medallion. An LR monogram is embossed in maroon on the back label. “MAISON FONDÉE EN 1776” and a very small LR monogram are printed in maroon on the back of the neck label directly opposite the smaller LR medallion. Gold engraving circumscribes the neck label.

35. The back label depicts the Imperial coat of arms flanked by the initials “L.O.R.” on either side in maroon. “CRISTAL®” appears on the left side of the back label, and the remainder of the label provides a government warning, lists the address of Roederer’s website, and states that the product was imported by MMD.

36. The use of the CRISTAL marks on bottles of CRISTAL ROSÉ champagne is very similar to their use on bottles of CRISTAL champagne. The CRISTAL ROSÉ champagne labels are a pink-hued copper color rather than the gold of CRISTAL champagne labels. The words “BRUT ROSÉ,” rather than “BRUT,” are printed in maroon on the bottom left of the LR medallion, and the words “MARQUE DÉPOSÉE” are printed in maroon at the top of the front label.

37. Bottles of CRISTAL and CRISTAL ROSÉ champagne are wrapped in yellow cellophane and packaged in gold boxes bearing a large LR medallion on their front. When

displayed in liquor stores, the bottles are kept in the yellow cellophane because it prevents ultraviolet light from penetrating the clear bottle and degrading the quality of the champagne.

38. In 2008, Roederer redesigned the labels of its non-CRISTAL champagnes. The following image depicts the redesigned BRUT PREMIER bottle and label.



39. The BRUT PREMIER bottle is green with a concave bottom. The front label is light gold and bordered by maroon and gold lines. A gold LR monogram is centered on the front label, over which “LOUIS ROEDERER” is printed in large, all-capital maroon letters. “CHAMPAGNE” is centered beneath “LOUIS ROEDERER” in smaller all-capital maroon letters. As with the bottle of CRISTAL champagne, “BRUT” is printed in the lower left-hand corner and “REIMS” is printed in the lower right-hand corner of the front label. “BRUT PREMIER” is printed above the LR monogram on the front label, and “MAISON FONDÉE EN 1776” is printed in very small gold letters on the top of the maroon border.

40. The BRUT PREMIER bottle does not have a shoulder label. The neck label states “ROEDERER” in vertical maroon letters. The lower part of the neck label is virtually

identical to the lower part of the CRISTAL neck label, including the white medallion with the gold LR monogram and trim. The neck label states “LOUIS ROEDERER,” rather than “CRISTAL,” on either side of the white medallion.

41. The labels of Roederer’s other champagnes are similar to the BRUT PREMIER label. They include an LR monogram on the front label and a white LR medallion on the front of the neck label. The use of the LR monogram on the front labels and the white LR medallion on the neck labels of Roederer’s non-CRISTAL champagnes links those champagnes with CRISTAL champagne.

42. Prior to 2008, the bottles of Roederer’s non-CRISTAL champagnes had a maroon, rather than white, LR medallion on the neck label. The medallion was larger and more ornate. The pre-2008 labels did include elements common to the CRISTAL champagne label, including the LR monogram on the front label and the prominent display of the LOUIS ROEDERER name on the front label.

43. As seen in the following image, ROEDERER ESTATE sparkling wine is sold in a green bottle. The bottle has a concave base.



44. The ROEDERER ESTATE label is brown and has a gold border. It is generally rectangular with an arch at the top. "ROEDERER ESTATE" is printed in all-capital yellow letters on the center of the front label. "ANDERSON VALLEY BRUT" and "ESTATE BOTTLED SPARKLING WINE" are printed in smaller gold letters beneath "ROEDERER ESTATE."

45. The neck label extends downwardly at the front. An "RE" monogram is printed in maroon and gold on the downwardly-extending portion of the neck label in a location corresponding to the location of the white LR medallion on the neck labels of Roederer champagnes. The RE monogram is topped by an eagle and surrounded by grapevines, both printed in gold. A gold ribbon stating "ROEDERER ESTATE" is located beneath the RE monogram. "ROEDERER ESTATE" is vertically printed in gold on the front of the neck label and horizontally printed in maroon on either side of the RE monogram.

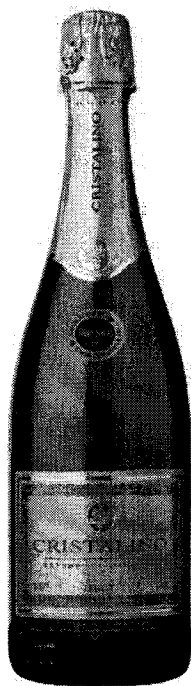
46. Another RE monogram is printed on the back of the neck label, encircled by the words "ROEDERER ESTATE ANDERSON VALLEY." "ROEDERER ESTATE" is vertically printed in gold letters on the back of the neck label.

47. The bottles and labeling of ROEDERER ESTATE ROSÉ and ROEDERER ESTATE L'ERMITAGE sparkling wine are similar to those of ROEDERER ESTATE sparkling wine. The ROEDERER ESTATE L'ERMITAGE label is dark gray with the word "L'ERMITAGE" centered above the name ROEDERER ESTATE. An RE monogram and shield are formed in the shoulder of the bottle. The labels on bottles of ROEDERER ESTATE ROSÉ and ROEDERER ESTATE L'ERMITAGE ROSÉ sparkling wine are a pink-hued dark copper.

***B. Carrión's marks***

48. In 2000, Carrión sought registration of the CRISTALINO mark in connection with alcoholic beverages (excluding beer) in International Class 33.<sup>5</sup> Carrión did not conduct any formal or informal searches or investigations before seeking registration of the CRISTALINO mark. In June 2002, after the mark was published for opposition, Roederer sent a letter to Carrión informing it of Roederer's rights in the '343 and '998 marks and asking Carrión to withdraw its application for registration and agree not to use the CRISTALINO mark for wine, sparkling wine, and champagne. Carrión did not respond to the letter or inform Friend of its existence. Roederer subsequently opposed registration of the CRISTALINO mark.<sup>6</sup>

49. The following image depicts a present-day CRISTALINO bottle.



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<sup>5</sup> Jaume Serra had earlier sought registration of the mark CRISTALINO JAUME SERRA, but that application was abandoned.

<sup>6</sup> The opposition was suspended pending resolution of this matter.

50. The bottle is green and has a concave bottom. The front label is a gold rectangle with a black bottom edge. “CRISTALINO” is printed in black Roman serif type on the center of the front label. A black line is located underneath “CRISTALINO” and a gold medallion with an image of a bunch of grapes is located immediately above “CRISTALINO.” “METODO TRADICIONAL” is printed in smaller burgundy letters beneath the word “CRISTALINO.” “BRUT” is printed in larger letters in black beneath the words “METODO TRADICIONAL.” “CAVA” is printed in burgundy on the bottom right-hand corner of the label. The bottom left-hand corner of the label states in burgundy “SPARKLING WINE FERMENTED IN THIS BOTTLE.” Two borders extend around the perimeter of the front label. The burgundy inner border is comprised of grape leaves and grape bunches. A second border of two gold lines encloses the border of grape leaves and grape bunches. The name “CRISTALINO” is the dominant element of the front label.

51. On the black bottom edge, which is outside the borders, the label states in very small letters “Produced by: Jaume Serra / PRODUCE OF SPAIN,” provides the address of the Jaume Serra winery, and states “IMPORTED BY: CIV (USA), SACRAMENTO, CA.” The alcohol by volume is printed on the left side of the black edge and the volume of the bottle is printed on the right side of the black edge.

52. A circular sticker having a black center and gold edging is located on the shoulder of the bottle. “*Wine & Spirits Magazine*” is printed in gold on the sticker’s center and “Value Brand of the Year 3 Consecutive Years” is printed in black on its edging.

53. The neck label is gold and extends downwardly in the front. A bunch-of-grapes medallion is located in the downwardly-extending region of the neck label. “CRISTALINO” is



vertically printed in black on the front of the neck label. The bottom of the neck label is edged with highly-reflective gold. The back of the neck label is blank.

54. Another label is located on the back of the CRISTALINO bottle. Within a two-line gold border, the name “CRISTALINO” is printed in all-capital black letters. The word “BRUT” appears beneath “CRISTALINO,” separated by a black line. Underneath the word “BRUT,” the label states that the second fermentation of the cava took place in the bottle, advertises the cava’s “soft scent of toast and dry, lingering citrus qualities on the palate,” and describes CRISTALINO cava as “a clean bubbly that is sophisticated enough for just about any meal—as well as your next celebration.” The surgeon general’s warning and a bar code are located on the bottom of the back label, outside of the gold border.

55. The CRISTALINO ROSÉ label is virtually identical to the CRISTALINO label, except that it is a pink-hued copper color. The CRISTALINO ROSÉ bottle is clear and has a concave bottom. “ROSÉ BRUT” appears in black beneath the “CRISTALINO” name on the front label, and the center of the *Wine & Spirits* sticker is pink instead of black.



56. Although the bottles used for CRISTALINO cava have always been green, the CRISTALINO label has changed significantly since its introduction in 1989. The 1989 version of the CRISTALINO label is shown in the following black-and-white copy of the 1989 BATF application.



57. In 1989, the front label of CRISTALINO BRUT was gold. “CRISTALINO” was centered on the front label in large all-capital letters. “JAUME SERRA” was printed in all-capital letters immediately below “CRISTALINO.” The JAUME SERRA was smaller than the CRISTALINO. A design of curly lines surrounded the words “CRISTALINO JAUME SERRA,” and the words “BRUT” and “SPARKLING WINE PRODUCT OF SPAIN” were vertically stacked above the word “CRISTALINO.” “METHODE CHAMPENOISE” and “METHODE TRADITIONNELLE” were printed beneath JAUME SERRA, and CAVA was printed in large letters beneath those phrases.

58. “CRISTALINO JAUME SERRA” was centered at the top of the back label, which included a description of the in-the-bottle second fermentation and grapes used to produce the cava. “CRISTALINO” was printed on the center of the neck label, with “JAUME SERRA” on the right and “CRISTALINO” on the left. “BRUT” was printed on the neck label above “CRISTALINO.” The back of the neck label included a crest surrounded by the words “CRISTALINO JAUME SERRA.” The 1989 CRISTALINO bottle prominently featured the JAUME SERRA name on the front, back, and neck labels.

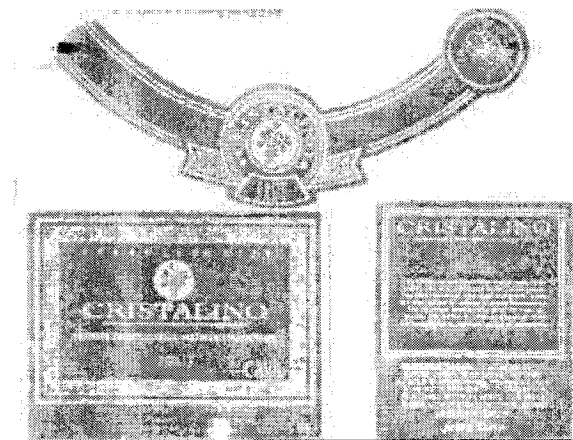
59. Jaume Serra updated the CRISTALINO labels in 1991. A copy of the BATF application for the 1991 label is shown below.



60. The name “CRISTALINO” was centered on the front label and the name “JAUME SERRA” printed beneath it. The phrases “METHODE CHAMPENOISE” and “METHODE TRADITIONNELLE” were located in smaller font between “CRISTALINO” and “JAUME SERRA.” The bunch-of-grapes medallion found on the label today was added to the label above the name “CRISTALINO.” The back label continued to prominently feature the name “CRISTALINO JAUME SERRA.”

61. The bunch-of-grapes medallion was centered on the neck label with a ribbon identifying the sweetness of the cava beneath it and “CRISTALINO” above it. The right and left sides of the neck label both read “JAUME SERRA.” A medallion including the name “JAUME SERRA” was located on the back of the neck label. The CRISTALINO BRUT labels were black. The CRISTALINO DRY and SEMI-DRY labels were gold. Again, the 1991 labels emphasized the JAUME SERRA name.

62. In 1993, Carrión again changed the CRISTALINO cava labels, as shown in the following reproduction of the BATF label application.



63. The 1993 CRISTALINO BRUT labels were very similar to the current labels, except that 1993 labels were black instead of gold. The front label included the CRISTALINO name, bunch-of-grapes medallion, border, and words "BRUT" and "CAVA" found on the front label today. "METHODE TRADITIONNELLE" and "METHOD CHAMPENOISE" were printed underneath "CRISTALINO" in the location where "METODO TRADICIONAL" is printed today. "SPARKLING WINE" was printed above the medallion. The winery and import company information was located at the bottom edge of the front label and outside the borders, just as it is today.

64. With the exception of the language describing the cava, the back label is virtually identical to the current back label. The neck label included the bunch-of-grapes medallion encircled by "CRISTALINO." The word "BRUT" appeared on a ribbon beneath the bunch-of-grapes medallion, and the Jaume Serra crest appeared, including the name "JAUME SERRA," on the back of the neck label.

65. The 1993 labels de-emphasized the "JAUME SERRA" name by removing it from the main portion of the front label. Friend credibly testified that "JAUME SERRA" was

removed because the pre-1993 labels were “busy” and “confusing” and the name “Jaume Serra” was difficult for U.S. customers to pronounce.

66. Friend further testified that a buyer at the Wine Max store in San Francisco indicated in 1994 that he would purchase five cases of CRISTALINO BRUT cava if the label was changed from black to the gold label used by CRISTALINO EXTRA-DRY cava because there was no market for CRISTALINO EXTRA-DRY cava but he could sell CRISTALINO BRUT cava if the label was gold. Friend believed that other retailers would agree with the Wine Max buyer’s opinion. He thought the change was worthwhile because a purchase of five cases represented a commitment to the product on the part of the retailer and he could use the Wine Max buyer’s purchase of five cases to persuade other retailers to stock CRISTALINO cava. As a result, the CRISTALINO BRUT label was changed from black to gold.

67. In the mid-1990’s, Jaume Serra changed the phrases “METHODE TRADITIONNELLE” and “METHODE CHAMPENOISE” to “METODO TRADICIONAL” to conform to European Community regulations.

***C. The meaning of the marks***

68. “CRISTAL” is not a common word in English. The English translation of “CRISTAL” is “crystal,” which means “quartz that is transparent or nearly so and that is either colorless or only slightly tinged.” *Webster’s Third New International Dictionary* 548 (2002). When used in the United States, the word “CRISTAL” refers to a proper name, a geographic location, or Roederer’s CRISTAL champagne. U.S. consumers pronounce “CRISTAL” with a long “e” in the first syllable and the accent on the second syllable.

69. “CRISTALINO” is not a common word in English. The English translation of “CRISTALINO” is “crystalline,” which means “made of crystal” or “resembling crystal as

transparent, pure, pellucid.” *Id.* at 549. When spoken by U.S. consumers, the first syllable is pronounced with a short “i” and the accent is on the third syllable.

70. “CRISTAL” is a generally meaningful word, or morpheme. English speakers recognize the suffix “INO” as conveying a diminutive, i.e., a smaller or lesser, meaning or a “related to” meaning.<sup>7</sup> The addition of the suffix “INO” to the root word “CRISTAL” to form “CRISTALINO” suggests to English speakers that CRISTALINO is a diminutive of or somehow associated with the root word CRISTAL.

71. In recent years, the media has recognized the verbal association between “CRISTALINO” and “CRISTAL” by suggesting that those who cannot afford CRISTAL champagne should instead purchase CRISTALINO cava and describing CRISTALINO cava as “the other CRISTAL.” In addition, a number of Internet postings indicate that consumers purchase CRISTALINO cava because the name sounds like “CRISTAL.” Some of those posts describe CRISTALINO cava as CRISTAL’s “younger brother.”

***D. Similar marks***

72. Marks including the terms “crystal,” “crystal,” “krystal,” or some variant (CRISTAL or similar terms) have been registered for use in connection with a number of products. A 1988 search of U.S. trademark registrations indicates that there were about sixty registrations or applications for registrations for marks using CRISTAL or similar terms in connection with alcoholic and non-alcoholic beverages. Some of the applications for registration

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<sup>7</sup> Roederer asks the Court in its post-trial brief to take judicial notice under Rule 201 of the Federal Rules of Evidence of a press release dated February 17, 2010, describing a new Dannon yogurt product named “Dan-o-nino.” Roederer also asks the Court to take judicial notice of two March 2010 media mentions of CRISTAL champagne. Defendants object because the March 2010 media mentions did not exist at the time of trial and because Roederer offered no explanation for failing to offer the February 17 press release at trial. The Court need not decide this issue because consideration of the press release and media mentions would not alter its findings of fact or conclusions of law.

were abandoned. Also in 1988, trade names including CRISTAL or similar terms were listed in trade directories in connection with alcoholic and non-alcoholic beverages. Defendants introduced no evidence of the geographical extent or volume of sales of the products sold under those marks or trade names.

73. In 1995, CRYSTAL LAKE wine (including “California champagne”), CRYSTAL GEYSER mineral water, AUGUARDIENTE CRISTAL liquor, STOLICHNAYA CRISTALL vodka, CRYSTAL LIGHT soft drinks, and CRISTALINO sparkling wine were available for purchase in California.

74. A 2009 search of U.S. trademark registrations identified registrations for marks using CRISTAL or similar terms for a number of products, about forty of which were alcoholic beverages. Many of those registrations were related. For example, there were registrations for over fifteen variants of the “CRISTALL” mark for use in connection with vodka. In addition, an Internet search located approximately forty products using CRISTAL or similar terms, including rum, vodka, salt, and bottled water. Defendants introduced no evidence of the geographical extent or volume of sales of the products sold under the registered marks or names. Several of the products located on the Internet were not available for sale from the website on which they were found. Ten of the products found on the Internet were wines, but none of them had labels that were gold or otherwise resembled the CRISTAL labels. Based on the evidence received at trial, some of the wines did not display the CRISTAL or similar terms on their labels or bottles.

75. Roederer has enforced its trademark rights against those using CRISTAL or similar terms in connection with champagne and sparkling wine, but does not enforce its trademark rights against every product having CRISTAL or similar terms in its name. In 1988, Roederer sent a cease-and-desist letter to an entity marketing an American sparkling wine under

the name “California Crystal.” In 1998, Roederer unsuccessfully opposed the registration of “CRYSTAL CREEK” for use in connection with wine. The United States Court of Appeals for the Federal Circuit affirmed the Trademark Trial and Appeal Board’s finding of no likelihood of confusion based on “the dissimilarity of the marks with respect to appearance, sound, significance, and commercial impression.” *Champagne Louis Roederer, S.A. v. Delicato Vineyards*, 148 F.3d 1373, 1374-75 (Fed. Cir. 1998). In 2004, Roederer halted the sale in the United States of cava marketed under the name “CRISTAL CAVA CASTELLBLANCH” by Castellblanch S.A. and Victore Imports Company.

## **V. Marketing and trade channels**

### **A. Recognition, advertising, and promotion of CRISTAL champagne**

76. Roederer is considered one of the finest champagne houses in the world.

CRISTAL champagne was known in the United States as one of the best champagnes by wine connoisseurs and those knowledgeable about wine at least as early as the 1970’s. The quality of CRISTAL champagne continues to be recognized today. For example, in December 2009, CRISTAL champagne received a 100-point rating from *Wine & Spirits* magazine. The recognition of CRISTAL champagne as one of the best champagnes by those knowledgeable about wine is unquestionable.

77. CRISTAL champagne is made with a sophisticated consumer or wine connoisseur in mind. However, not all consumers of CRISTAL champagne are sophisticated or wine connoisseurs. Some consumers purchase CRISTAL champagne because they appreciate its quality. Others, including celebrities, purchase CRISTAL champagne for the social recognition it brings.



78. CRISTAL is Roederer's "flagship" brand. The reputation of CRISTAL champagne helps persuade distributors and retailers to carry other Roederer and Roederer Estate products and permits Roederer to sell its other products at a premium price. Displaying CRISTAL champagne in a liquor store adds to the prestige of the store, and retailers actively market CRISTAL champagne for this reason. However, only a small percent of consumers know that Roederer produces CRISTAL champagne. Consequently, while CRISTAL's reputation provides certain benefits within the industry to Roederer and its other products, its influence on consumer perception of the Roederer brand is attenuated.

79. "Aspirational" brands convey a certain image that people aspire to share. By their very nature, aspirational brands are known by those who do not actually purchase or consume the branded product. For example, the ROLEX brand projects an image of success that consumers seek to display by wearing a ROLEX watch. Some who cannot afford a ROLEX watch aspire to do so in the future in the hopes of projecting a successful image. Consumers purchase CRISTAL champagne because it projects a sense of quality, elegance, prestige, glamour, and status. To maintain the image of the CRISTAL brand, Roederer prices CRISTAL champagne higher than DOM PERIGNON champagne and portrays CRISTAL champagne as a work of art. The CRISTAL brand is an aspirational brand and its audience is larger than those who consume CRISTAL champagne.

80. In 1998, Roederer adopted the slogan "Without Compromise" for its products, which it utilized in two to three campaigns over a period of several years. The campaign featured BRUT PREMIER champagne and was intended to advertise the Roederer brand by focusing on the LR monogram. The Without Compromise advertisements were published in Roederer's *L'Officiel* newsletter in 2001, 2002, and 2003. Roederer publishes about 50,000

copies of *L'Officiel* annually in several different languages. Copies of the newsletter are sent to Roederer's distributors, including Roederer's U.S. distributors, who then provide them to customers, journalists, and liquor stores. In 2006, Roederer placed brightly-colored Without Compromise advertisements inspired by Andy Warhol and an advertisement highlighting the name Roederer and its founding year (1776) in the *New York Times*, *Wine News*, *Quarterly Review of Wine*, *Wine & Spirits*, *Wine Enthusiast*, and *Wine Spectator*.

81. In 2009, Roederer adopted an "Artistry of Champagne" slogan for its advertising. The five Artistry of Champagne advertisements feature an abstract depiction of a champagne bottle, the front label of the champagne, and an LR monogram on the neck in the same location as that of the smaller white LR medallion on the neck of an actual bottle. The labels shown include those of CRISTAL, BRUT VINTAGE, BRUT PREMIER, and BLANC DE BLANCS champagne. The 2009 Artistry of Champagne advertisements showing CRISTAL champagne appeared in the *New Yorker*, Pebble Beach publications, a catalog for a classic motorcar show, a catalog for a horse show, and the December 2009 issue of *Wine & Spirits*.

82. Prior to 2009, Roederer's policy was not to promote CRISTAL champagne. Roederer had two reasons for this policy. First, advertising was unnecessary because Roederer sold every bottle of CRISTAL champagne it produced. Second, Roederer believed advertising CRISTAL champagne would make it seem like an ordinary product. On occasion, however, distributors promote the CRISTAL brand with Roederer's permission, and retailers prominently feature CRISTAL champagne in their advertisements. Roederer donates CRISTAL champagne to about twenty charitable events and festivals in the United States on an annual basis. Roederer also sends samples of CRISTAL champagne to journalists at *Cooking Light*, *Quarterly Review of*

*Wine, Wine & Spirits, Gourmet, Bon Appétit*, and similar publications, as well as to newspaper journalists in major metropolitan areas.

83. CRISTAL champagne has enjoyed unsolicited publicity for several decades. Between 1950 and 1989, CRISTAL champagne was mentioned in 140 newspaper articles, and between 1990 and 1993, it was mentioned in an additional 67 newspaper articles. Newspapers that published articles mentioning CRISTAL champagne during that time include the *New York Times*, *San Francisco Globe*, *San Francisco Chronicle*, *Los Angeles Times*, and *Miami Herald*. The vast majority of the newspaper articles mentioned CRISTAL champagne either in connection with a special event at which CRISTAL champagne was served, as one of several champagnes in an article about sparkling wine, or in a description of the expensive or extravagant lifestyle of a particular celebrity.

84. For example, one article published in several newspapers in December 1989 recommended serving champagne when entertaining over the holidays. That article characterized “Louis Roederer” as one of “America’s favorite French champagnes” and then briefly described Roederer’s CRISTAL and BRUT PREMIER champagne. The remainder of the article was an appetizer recipe. On March 5, 1989, the *New York Times* mentioned that CRISTAL ROSÉ champagne was served as the dessert wine to President Ronald Reagan at Le Cirque, and on January 20, 1983, the *Palm Beach News* published an article describing a lunch with President Richard Nixon and mentioning that CRISTAL champagne was served

85. Only a few of the articles were directed to Roederer or CRISTAL champagne. One such article was published in the *San Francisco Globe* in 1954. This article highlighted the visit of the chief executive of Roederer to introduce the 1949 vintage of CRISTAL champagne.

86. In 1979, the *Los Angeles Times* published an article on champagne describing Roederer's products, including CRISTAL champagne, and an article in the *New York Times Magazine* in 1979 described CRISTAL champagne as the most expensive champagne available. The *Los Angeles Times* published the results of the Wine & Cheese Festival rankings in 1970, in which CRISTAL champagne was rated the Grand Champion. In 1979, the *Fresno Bee* described a champagne dinner at which several Roederer champagnes were served, including CRISTAL champagne. Edward McCarthy, the author of *Champagne for Dummies* and a wine expert, testified that CRISTAL champagne's reputation in the field of wine and champagne was "singular" and had been since at least the early 1970's.

87. Between 1950 and 1989, CRISTAL champagne was mentioned in seventeen magazines, and between 1990 and 1993, in another six magazines. Many of those magazines were special-interest magazines such as *Food & Wine* and *Wine Spectator*. When CRISTAL champagne was mentioned or featured in a general-interest magazine such as *Vogue*, *W*, or *Bazaar*, it was generally mentioned in connection with entertaining or travel and as one of several products. In 1985, CRISTAL champagne was displayed on the cover of *Bride's* in a wine cooler next to two champagne flutes. Only the neck label was visible. *Elle* featured a bottle of CRISTAL champagne on its cover along with a number of other luxury goods in May 1989. Only the neck and shoulder labels were visible. In 1973, *Time* published an article describing President Nixon's dinner with Leonid Brezhnev, the General Secretary of the Communist Party of the Soviet Union. The first line of the article read: "The fear has been buried in champagne toasts (Roederer Cristal) and broad presidential smiles and the haunting strains of Tchaikovsky by the Marine Band." The other nine paragraphs described the dinner and its political significance.

88. CRISTAL champagne was featured as a product placement in the movies *Heartburn*, *Star 80*, and *In the Money*. All of those movies were released before 1990.

89. In 1987, Andrew Jones, the “Flying Wine Man,” hosted local radio shows on 135 stations in 20 states explaining champagne and featuring ten brands. During his show, Jones described Roederer’s history and the history of CRISTAL champagne. The predicted listening audience for the tour was 40 million.

90. In the 1980’s and earlier decades, celebrities such as Sophia Loren, Julio Iglesias and Ivana Trump were unofficial “ambassadors” of the CRISTAL brand. Pictures showing the “ambassadors” and a bottle of CRISTAL champagne were distributed in various publications, but no evidence indicates the extent of their distribution. In April 1992, Frank Sinatra described CRISTAL champagne as his “favorite” in front of a 1000-person audience. President Reagan was photographed with CRISTAL champagne, although the publicity this photograph received is unknown.

91. Between 1997 and 2009, CRISTAL champagne was mentioned in about 35 magazines and almost 900 newspaper articles. Those articles were published in the *New York Times*, *Miami Herald*, *Washington Post*, *Wall Street Journal*, *USA Today*, *InStyle*, *Entertainment Weekly*, *Rolling Stone*, and *Forbes*, as well as on [cnn.com](http://cnn.com) and [msnbc.com](http://msnbc.com).

92. Between 1997 and 2009, CRISTAL champagne was mentioned in just under 300 books. A significant number of the books were written by bestselling authors such as Nora Roberts, Candace Bushnell, Richard North Patterson, John Grisham, and Danielle Steele. Typically, CRISTAL champagne was mentioned in connection with the consumption of or a request for CRISTAL champagne by a character.

93. Today, CRISTAL champagne is frequently used as a product placement in movies and television shows. Roederer and MMD manage the use of the CRISTAL mark in movies and on television by reviewing the scripts to determine how CRISTAL champagne will be used. If Roederer considers the proposed use inappropriate, Roederer will reject the request to use CRISTAL champagne. In some cases, producers alter the use of CRISTAL champagne in response to a rejection by Roederer. As of 2004, MMD was receiving about forty requests a year to place CRISTAL champagne in movies, television shows, and music videos. Roederer and MMD do not pay for any of those product placements.

94. CRISTAL champagne has appeared in several movies since 1990, including *The Hours*, *Austin Powers Goldmember*, *Lost in Translation*, *Something's Gotta Give*, *The First Wives Club*, *Eyes Wide Shut*, and *The Terminal*. The references to CRISTAL champagne are typically oral or a screen shot of a CRISTAL champagne bottle that is often in the background or partially obscured. CRISTAL champagne has also appeared in several television shows, including *Entourage*, *ER*, and *30 Rock*. In many of those television shows, CRISTAL champagne was shown in the background or partially obscured. In other television shows, CRISTAL champagne was mentioned by name. For example, a character complained about the high price of CRISTAL champagne in one episode of *The Sopranos*.

95. In some of the television shows, CRISTAL champagne was highlighted as an important part of the show. In a show celebrating Oprah Winfrey's 50th birthday, John Travolta proposed a toast to Winfrey, mentioned CRISTAL ROSÉ champagne by name twice, and described CRISTAL ROSÉ champagne as Winfrey's "favorite." A large bottle of CRISTAL ROSÉ champagne was then presented on-stage and the champagne consumed. On *The Tonight Show with Jay Leno*, a guest brandished a bottle of CRISTAL champagne during his entrance,

mentioned the champagne by name, and presented it to Jay Leno with much fanfare over a two-minute period.

96. The number of viewers of television shows and movies and the number of readers of magazines and newspapers referring to CRISTAL champagne is significant. On average, *Oprah!*'s audience numbers 8 million, *The Sopranos*' audience numbers 11 million, and *Entourage*'s audience numbers 2.5 million. The average circulation of the *New York Times* is about 1.5 million, the *San Francisco Chronicle* a little under 1 million, and *InStyle* about 1.7 million.

97. Beginning in the late 1990's, mentions of CRISTAL champagne became prevalent in music lyrics and videos by artists such as Jay-Z, Lil' Kim, Mariah Carey, Snoop Dog, and 50 Cent. *Women's Wear Daily* reported that CRISTAL was the ninth-most mentioned brand in Billboard's Top 20 singles in 2005, and the CRISTAL name was the eighth most-mentioned brand in rap music the same year. The *Washington Post* described CRISTAL as a "household name" as a result of this publicity. Media recognition of the CRISTAL brand includes statements such as "CRISTAL, everybody knows that kind of champagne." The brand recognition resulting from the references to CRISTAL champagne in rap music was commented on in the *San Francisco Chronicle* in 2004 and the *Wall Street Journal* in 2006.

98. In addition, over fifty videos, blogs, and pictures are available on the Internet where the poster displays a picture of a CRISTALINO bottle with the "INO" obliterated or obscured and describes CRISTALINO cava as CRISTAL's "younger brother" or otherwise jokes about the similarity between the words "CRISTAL" and "CRISTALINO." In making the joke, the consumers demonstrate their awareness of CRISTAL champagne.

**B. Recognition, advertising, and promotion of CRISTALINO cava**

99. Since 1993, CRISTALINO cava has received favorable reviews or been recognized as a good value in a number of publications, including the *San Francisco Independent*, *Atlanta Journal*, and *Philadelphia Enquirer*. CRISTALINO cava received a silver medal in its category at the 1994 International Wine Competition in Atlanta. *Wine Spectator* recognized CRISTALINO cava as a “Best Buy” in 1996, and *Wine & Spirits* recognized CRISTALINO cava as the “Value Brand of the Year” in 2002, 2003, and 2004. The December 2003 issue of *Bon Appétit* described CRISTALINO cava as giving “excellent effervescent flavor at a moderate price.” Carrión promotes CRISTALINO cava as a “best buy” based on its combination of price and quality, and its marketing strategy is based in part on the assumption that consumers will purchase a less-expensive sparkling wine when large quantities are required.

100. Carrión maintains a “bank” for the promotion of CRISTALINO cava of \$\* \* \* for each case of CRISTALINO cava sold to a distributor. The bank funds pricing promotions, revisions to wine lists, and point-of-sale promotional devices. Typically, the amount expensed against the bank by CIV USA on an annual basis is between \$\* \* \* and \$\* \* \*. Between 1999 and 2000, CIV USA retained TKO Advertising, Inc., to assist with the promotion of CRISTALINO cava. During that time frame, CIV USA spent about \$\* \* \* on advertising CRISTALINO cava. Between 2000 and 2006, excluding the TKO Advertising expenditures, CIV USA spent approximately \$\* \* \* on media advertising and \$\* \* \* on promoting and marketing CRISTALINO cava.

**C. Trade channels**

101. There are around \* \* \* U.S. distributors of CRISTAL champagne, which is sold in approximately 4500 liquor stores in the United States. About 70% of those liquor stores also



carry BRUT PREMIER champagne. Sales at liquor stores account for half of the sales of CRISTAL champagne and sales at restaurants, hotels, and nightclubs account for the other half. At least twelve liquor distributors carry both CRISTAL champagne and CRISTALINO cava.

102. CRISTAL champagne is sold at a variety of liquor stores, including Surdyk's Liquor in Minneapolis and Sherry Lehmann in New York. At times, CRISTAL champagne is sold at mass merchandisers such as Safeway and Costco, although such sales are inconsistent with the desired image of CRISTAL champagne. Liquor stores display CRISTAL champagne on the top shelf, behind the check-out counter, or in a "lockbox."

103. CRISTALINO cava is sold at mass merchandisers such as Costco, Safeway, and Sam's Club. CRISTALINO cava is also sold in a variety of liquor stores, including Surdyk's in Minneapolis; Beltramo, K&L, and The Wine Exchange in California; and Sherry Lehmann in New York. When sold in liquor stores, CRISTALINO cava is typically displayed on lower shelves or in bins located in or beside the aisles.

104. Although CRISTAL champagne is not sold at every liquor store that sells CRISTALINO cava, the products are frequently sold at the same liquor stores. CRISTAL champagne and CRISTALINO cava are displayed in the same area, usually identified as the "champagne and sparkling wine" area, which may be subdivided by country or region of origin.

105. In flyers and brochures for sales at liquor stores, sparkling wines are generally listed together under a "champagne and sparkling wine" category, which is then divided into subcategories of "French Champagne," "European Sparkling," and "California Sparkling" or "American Sparkling." CRISTAL champagne is listed under the French Champagne subcategory and CRISTALINO cava under the European Sparkling subcategory.

106. Although CRISTAL champagne and CRISTALINO cava do not frequently appear on the same wine list, such listings exist. When they are displayed on the same wine lists, CRISTAL champagne and CRISTALINO cava are typically listed together in close proximity in a “champagne and sparkling wine” section. Many wine lists identify the country of origin of CRISTAL champagne and CRISTALINO cava. Almost all wine lists identify CRISTAL champagne as a Roederer product; fewer identify CRISTALINO cava as a product of the Jaume Serra winery.

107. Neither CRISTAL champagne nor CRISTALINO cava is heavily advertised by its producer. Advertisements for and reviews of both products have appeared in *Wine & Spirits*, *Wine Enthusiast*, and *Wine Spectator*. The audiences of those publications have a median age in the late 40’s and a median household income of \$125,000 or higher. Over 80% of the readers have attended college.

## **VI. Actual confusion**

### **A. Testimony**

108. Fabrice Rossett began working at Roederer in 1974 as the export director. He worked for Roederer in various capacities until 1996, at which time he was the president and chief executive officer of MMD. Rossett testified that no retailer or consumer ever indicated to him that there was confusion between CRISTALINO cava and CRISTAL champagne.

109. McCarthy, the wine expert, worked in wine shops between 1976 and 1998. McCarthy testified that during the last nine years he worked in wine shops, after the introduction of CRISTALINO cava in 1989, consumers asked him if there was a relationship between CRISTALINO cava and CRISTAL champagne. McCarthy did not testify as to the frequency of those questions.

110. Xavier Barlier, the vice-president of marketing and communications at MMD, regularly visits the champagne and sparkling wine section of liquor stores as part of his duties. While working the Roederer table and pouring CRISTAL champagne at a Toast of the Town event, Barlier was asked: “Do you know that there’s a Cristalino table?” He testified that, beginning in 2001 and continuing to the present, consumers asked him if there was a relationship between CRISTALINO cava and CRISTAL champagne at store tastings, particularly during the winter holidays.

111. In December 2004, a liquor store owner in Michigan purchased bottles of CRISTALINO cava believing they were bottles of CRISTAL champagne because stickers placed on the bottle concealed the “INO” portion of “CRISTALINO” and proclaimed “1995 Louis Roederer.” Once notified of the sale, the district manager for CRISTALINO cava’s distributor in the region informed the store owner that the bottles were not CRISTAL champagne. No other action was taken with respect to this incident.

***B. Likelihood of confusion survey***

112. Roederer retained Dr. Leon B. Kaplan, the president and chief executive officer of Princeton Research and Consulting Center, to design and implement a survey intended to measure the likelihood of consumer confusion between CRISTAL and CRISTALINO. Dr. Kaplan holds a Ph.D. in Industrial Consumer Psychology from Purdue University and an MBA from the Wharton School. He has worked in the field of market research for over thirty years. Dr. Kaplan has designed about twenty surveys for intellectual property litigation and has been involved with over 200 other surveys.

113. The Kaplan survey was conducted on a nationwide basis during the fall of 2007 by a professional interviewing service. Neither the survey interviewers nor the survey

respondents knew the purpose of the survey. The interviewers surveyed 261 people in shopping malls in eight different regional U.S. markets. Two of the malls were located in the Northeast, two in the Midwest, two in the South, and two in the West. The survey participants were randomly divided into a control group and a test group.

114. Dr. Kaplan defined the survey universe as people who were 21 or older, had purchased in the past six months or were likely to purchase in the next six months imported sparkling wine under \$35, and were aware of CRISTAL champagne before the interview. Dr. Kaplan characterized this universe as “purchasers and potential purchasers of CRISTALINO who are aware of CRISTAL.” He selected the \$35 figure because he wanted to include those who had purchased CRISTALINO cava in a restaurant or were likely to do so as well as those who had purchased CRISTALINO cava in a liquor store or were likely to do so.

115. The interviewer first determined the potential respondents’ gender and age. Next, the interviewers determined whether the potential respondents had purchased in a store or restaurant in the past six months an imported sparkling wine for under \$35 per bottle or were likely to do so in the next six months. After screening for characteristics that would render a potential respondent ineligible, such as working for a law firm, the interviewers brought potential respondents to an interview area. Once in that area, the potential respondents were shown a bottle of CRISTAL champagne still wrapped in yellow cellophane and asked: “To the best of your knowledge, have you ever heard of or seen this brand of wine before today, or don’t you have an opinion about that?” Only potential respondents who indicated that they had heard of or seen CRISTAL champagne proceeded to the rest of the survey. Dr. Kaplan estimated that the interviewers at each survey site would need to bring 90 people to the interview room to reach the

desired number of 30 respondents per site. He had no knowledge of how many people were actually brought to the interview room.

116. Next, the interviewers asked the respondents a series of questions intended to serve as a “mental change of pace.” The respondents were then shown four bottles of imported sparkling wine displayed together in a line-up. The test group was shown bottles of VEUVE DU VERNAY sparkling wine, WILLM sparkling wine, PAUL CHENEAU sparkling wine, and CRISTALINO cava. The control group was shown VEUVE DU VERNAY sparkling wine, WILLM sparkling wine, PAUL CHENEAU sparkling wine, and a bottle of “COURTALINO” cava created as a control for the survey. The COURTALINO bottle was virtually identical to a CRISTALINO bottle except that the front and neck labels read “COURTALINO” rather than “CRISTALINO.” Dr. Kaplan chose the name “COURTALINO” because he thought it was as similar to “CRISTALINO” as possible without infringing the CRISTAL marks.

117. The respondent was given as much time as desired to look at the bottles as the respondent “normally would if you were thinking about what you might buy [in a store] or order [at a restaurant].” The respondent was then asked a series of questions intended to determine confusion as to brand; source; affiliation, connection, or sponsorship; and permission. The questions asked for both positive and negative responses and included the possibility that the respondent might have no opinion.<sup>8</sup> If a respondent answered “yes” to a question, the interviewer inquired which bottle, noted the response, and asked for and noted the respondent’s reason for responding in the affirmative. Once a respondent identified a bottle, it was removed. Respondents were permitted to identify more than one bottle in response to each question.

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<sup>8</sup> For example, one question asked “To the best of your knowledge, are or aren’t any of these sparkling wines connected or affiliated with the company that put out the sparkling wine I first showed you, or don’t you have an opinion about that?”

118. When analyzing the data, Dr. Kaplan classified a respondent as confused if the respondent identified the CRISTALINO bottle and mentioned the name similarity as the reason. With respect to CRISTALINO, Dr. Kaplan calculated that 6.9% of respondents were confused as to brand, 9.2% were confused as to source, 4.6% were confused as to affiliation, connection, or sponsorship, and 2.3% were confused as to permission for a total confusion of 23.1%. No respondents identified the COURTALINO bottle based on its name.

119. Of the respondents who identified the CRISTALINO bottle based on the name, 57% selected only the CRISTALINO bottle, 80% selected the CRISTALINO bottle when all four bottles were present, and 20% selected the CRISTALINO bottle when three bottles were present. The CRISTALINO bottle was never the third or fourth bottle selected. In addition to identifying the name as the reason for an affirmative answer, some respondents gave the similarity of the labels as a reason and stated that the CRISTALINO bottle could be a “less expensive version,” “an American knock-off of the first bottle,” or “a cheaper version of the original” bottle.

120. Nearly 30% of the respondents identified WILLM as being related to CRISTAL. The WILLM bottle is clear and its labels are primarily gold. The gold neck label on the WILLM bottle includes a medallion in the same location as the LR medallion on bottles of CRISTAL champagne.

121. Defendants retained Dr. Itamar Simonson, a professor of marketing at Stanford University, to review Dr. Kaplan’s report. Dr. Simonson studies consumer behavior and has conducted numerous mall intercept surveys. He testified that the survey universe was underinclusive because it should have included the potential respondents who were unaware of CRISTAL champagne. Based on Dr. Kaplan’s quota of 90 people to reach 30 respondents, Dr.

Simonson calculated that the total confusion was one-third (30/90) of 23.1%, or 7.7%, of what he considered the proper survey universe. Dr. Simonson also testified that the survey universe was overinclusive because the inclusion of people who had purchased wine for less than \$35 would include those who had purchased wine in a liquor store in the \$30 range. He believed those who purchased sparkling wine in a liquor store for \$30 were more likely to have heard of CRISTAL champagne because \$30 is closer to the price of CRISTAL champagne than \$7.

122. Dr. Simonson further testified that the survey format did not approximate market conditions because it was unlikely that a consumer would inspect a bottle of CRISTAL champagne immediately before looking at a bottle of CRISTALINO cava. He opined that the failure to approximate market conditions turned the survey into a “matching game” where respondents looked for the “right” answer. In other words, he opined that the survey created “demand effects.” Dr. Simonson testified that the identification of the WILLM bottle as related to the CRISTAL bottle by about 30% of the respondents is evidence of those demand effects because there was “no obvious reason” why the respondents would give a positive response with respect to confusion for the WILLM bottle. Dr. Simonson later testified that the primary reason respondents identified the WILLM bottle was because it was clear, as was the CRISTAL bottle. Finally, Simonson opined that “COURTALINO” was an inappropriate control and that a control should be “as similar to the junior mark, in this case, CRISTALINO, as possible, without infringing on the senior mark.”

## **NON-CONFIDENTIAL CONCLUSIONS OF LAW**

### **I. Jurisdiction**

1. Roederer asserts claims of trademark infringement, unfair competition, and trademark dilution under the Lanham Act, 15 U.S.C. §§ 1051-1141n (2006). Roederer also

asserts a common-law unfair competition claim and a claim under the Minnesota Deceptive Trade Practices Act, Minn. Stat. §§ 325D.43-.48 (2008).

2. The Court has jurisdiction over the Lanham Act claims pursuant to 15 U.S.C. § 1121 and 28 U.S.C. § 1338 (2006). The Court has supplemental jurisdiction over the state-law claims pursuant to 28 U.S.C. § 1367 (2006).

## **II. Trademark infringement and unfair competition**

3. Roederer asserts claims of trademark infringement and unfair competition under §§ 32 and 43(a) of the Lanham Act. To succeed on those claims, Roederer must show that it has a valid, protectable mark and that there is a likelihood of confusion between its mark and the CRISTALINO mark. *See B & B Hardware, Inc. v. Hargis Indus., Inc.*, 569 F.3d 383, 389 (8th Cir. 2009); *see also Eniva Corp. v. Global Water Solutions, Inc.*, 440 F. Supp. 2d 1042, 1049 n.3 (D. Minn. 2006) (noting *that* claims under §§ 32 and 43(a) of the Lanham Act “are measured by identical ‘likely to cause confusion’ standards”). The Court does not independently analyze Roederer’s state-law claims because the parties agree they are coextensive with the Lanham Act claims. *See DaimlerChrysler AG v. Bloom*, 315 F.3d 932, 935 n.3 (8th Cir. 2003).

### **A. Validity of the CRISTAL marks**

4. Roederer’s federal registration for the ’343 mark for CRISTAL CHAMPAGNE & Design for use in connection with champagne is prima facie evidence of the validity of the ’343 mark. *See* 15 U.S.C. § 1115(a); *see also Aromatique, Inc. v. Golden Seal, Inc.*, 28 F.3d 863, 869 (8th Cir. 1994) (“[R]egistration of a mark creates a rebuttable presumption that the mark is valid.”). Defendants have offered no evidence to rebut that presumption. The ’343 mark is valid and protectable.



5. The U.S. Patent & Trademark Office accepted Roederer's certificate of incontestability for the '998 mark for the words CRISTAL CHAMPAGNE for use in connection with champagne. Accordingly, the '998 mark is incontestable and valid. *See* 15 U.S.C. § 1065; *see also B & B Hardware*, 569 F.3d at 389 ("Once a mark becomes incontestable, it 'cannot be challenged . . . for mere descriptiveness, or on the basis that the mark lacks secondary meaning.'") (quoting *Sunrise Jewelry Mfg. Corp. v. Fred S.A.*, 175 F.3d 1322, 1324 (Fed. Cir. 1999)).

6. Roederer also asserts rights in a common-law CRISTAL mark used in connection with champagne. "[A] common-law trademark arises from the adoption and actual use of a word, phrase, logo, or other device to identify goods or services with a particular party." *First Bank v. First Bank Sys., Inc.*, 84 F.3d 1040, 1044 (8th Cir. 1996). Roederer owns the common-law CRISTAL mark for use in connection with champagne by virtue of its continuous use in the United States of the word "CRISTAL" to identify its champagne for over six decades.

7. A trademark is entitled to trademark protection if it is distinctive. *Schwan's IP, LLC v. Kraft Pizza Co.*, 460 F.3d 971, 974 (8th Cir. 2006). Roederer bears the burden of establishing that its unregistered CRISTAL mark is protectable under trademark law. *Frosty Treats, Inc. v. Sony Computer Entm't Am., Inc.*, 426 F.3d 1001, 1003 (8th Cir. 2005). Although Defendants assert the CRISTAL marks are weak, they do not dispute the validity of the common-law CRISTAL mark. Moreover, for the reasons set forth below with respect to the conceptual strength of the CRISTAL marks, the common-law CRISTAL mark is suggestive. Because it is suggestive, the common-law CRISTAL mark is valid and protectable. *See Co-Rect Prods., Inc. v. Marvy! Adver. Photography, Inc.*, 780 F.2d 1324, 1329 (8th Cir. 1985).

**B. Likelihood of confusion**

8. Roederer asserts a likelihood of confusion as to association or sponsorship between the use of “CRISTALINO” on cava and its CRISTAL marks. Accordingly, the question is whether Defendants’ use of the CRISTALINO mark so resembles Roederer’s use of the CRISTAL marks that it is likely to cause confusion among consumers as to whether the source of CRISTAL champagne has sponsored, endorsed, or is otherwise affiliated with CRISTALINO cava. *See Mut. of Omaha Ins. Co. v. Novak*, 836 F.2d 397, 398 (8th Cir. 1987); *see also Insty\*Bit, Inc. v. Poly-Tech Indus., Inc.*, 95 F.3d 663, 671 (8th Cir. 1996) (explaining that a finding of trade dress infringement requires consumers to “purchase the alleged infringer’s products after associating the trade dress of those products with the trade dress of a single, albeit anonymous source”); *Anheuser-Busch, Inc. v. Balducci Publ’ns*, 28 F.3d 769, 774 (8th Cir. 1994) (explaining that likelihood of confusion protects against use of a plaintiff’s mark on any product that would reasonably be thought by the buying public to be affiliated with, connected with, or sponsored by, the trademark owner). The likelihood of confusion must be “among an appreciable number of consumers.” *Gateway Inc. v. Companion Prods., Inc.*, 384 F.3d 503, 509 (8th Cir. 2004).

9. Likelihood of confusion is a question of fact. *SquirtCo v. Seven-Up Co.*, 628 F.2d 1086, 1090-91 (8th Cir. 1980). Several factors are pertinent to the likelihood of confusion analysis, including (1) the strength of the trademark; (2) the similarity between the plaintiff’s and defendant’s marks; (3) the competitive proximity of the parties’ products; (4) the alleged infringer’s intent to confuse the public; (5) evidence of any actual confusion; and (6) whether the kind of product, its cost, and the conditions of purchase can eliminate the likelihood of confusion that would otherwise exist. *Id.* at 1090-91. These factors do not operate as a precise test, but

instead represent the type of considerations a court should examine in determining whether likelihood of confusion exists. *See also Duluth News-Tribune v. Mesabi Publ'g Co.*, 84 F.3d 1093, 1096 (8th Cir. 1996). “When balancing the interests in a famous, established mark against the interests of a newcomer, [a court is] compelled to resolve doubts on this point against the newcomer.” *Specialty Brands, Inc. v. Coffee Bean Distribs., Inc.*, 748 F.2d 669, 674 (Fed. Cir. 1984).

### **1. Strength of Roederer's trademarks**

10. A mark's strength consists of both conceptual strength and commercial strength in the marketplace. *George & Co. v. Imagination Entm't Ltd.*, 575 F.3d 383, 393 (4th Cir. 2009); *Mars Musical Adventures, Inc. v. Mars, Inc.*, 159 F. Supp. 2d 1146, 1150 (D. Minn. 2001); *see also* 2 J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* § 11:83 (4th ed. 2010) (“While some courts have made the strong-weak evaluation solely upon the place of a term on the spectrum of marks, such an approach is incomplete. One must in addition look at the marketplace strength of the mark at the time of litigation or at the time registration is sought.” (footnote omitted)).

#### **a. Conceptual strength**

11. The conceptual strength of a trademark depends on its classification as (1) arbitrary or fanciful, (2) suggestive, (3) descriptive, or (4) generic. *See Insty\*Bit*, 95 F.3d at 672-73. An arbitrary mark is one that uses a common word to describe a product in an unfamiliar way, while a fanciful mark is one invented solely for use as a trademark. *Id.* at 673 n.10. A suggestive mark requires some measure of imagination to reach a conclusion regarding the nature of the product. *Id.* at 673 n.11. “An arbitrary, fanciful, or suggestive mark is deemed inherently distinctive, and therefore entitled to protection, because its ‘intrinsic nature serves to

identify a particular source of a product.” *Id.* at 673 (quoting *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992)).

12. “A term is descriptive if it conveys an ‘immediate idea of the ingredients, qualities or characteristics of the goods.’” *Frosty Treats*, 426 F.3d at 1005 (quoting *Stuart Hall Co., Inc. v. Ampad Corp.*, 51 F.3d 780, 785-86 (8th Cir. 1995)). A descriptive mark is protectable only if it has become distinctive by acquiring secondary meaning. *Id.* A trademark has acquired secondary meaning if it has become so associated in the public mind with certain goods that it serves to identify them and distinguish them from other goods. *Id.* A generic term, which is merely used by the general public to identify a category of goods, is not protectable. *Id.*

13. An arbitrary or fanciful mark is the strongest possible trademark and is entitled to the “maximum degree of legal protection.” *First Bank*, 84 F.3d at 1045. A descriptive trademark is the weakest protectable mark. *Id.* The strength of a suggestive mark falls between that of an arbitrary or a fanciful mark and that of a descriptive mark. *See id.* A strong and distinctive trademark is entitled to greater protection than a weak or common mark. *Frosty Treats*, 426 F.3d at 1008. If a mark is weak, consumer confusion is unlikely because the mark’s components are so widely used that the public can easily distinguish slight differences in the marks, even if the goods are related. *Gen. Mills, Inc. v. Kellogg Co.*, 824 F.2d 622, 626 (8th Cir. 1987).

14. The incontestability of the ’998 mark does not prevent an inquiry into its strength. *See Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc.*, 43 F.3d 922, 934-35 (4th Cir. 1995). Roederer obtained its registration for the ’998 mark for CRISTAL CHAMPAGNE by claiming the mark had acquired distinctiveness under Section 2(f) of the Lanham Act. Consequently, Roederer has conceded that the ’998 mark is descriptive and not inherently

distinctive. *See Aromatique*, 28 F.3d at 869. The '998 mark is the weakest protectable mark with respect to conceptual strength.

15. Defendants assert that Roederer's concession of descriptiveness in its registration of the '998 mark extends to the '343 mark and the common-law CRISTAL mark. In *Aromatique*, the court held that "[t]he submission of evidence under Section 2(f) to show secondary meaning . . . amounts to a concession that *the mark sought to be registered* is not inherently distinctive." *Id.* (emphasis added). Moreover, it is well-established that federal registration of a mark does not affect the registrant's common-law rights in a mark because those rights arise from use, not registration. *See Gilbert/Robinson, Inc. v. Carrie Beverage-Mo., Inc.*, 989 F.2d 985, 991-92 (8th Cir. 1993); 4A Louis Altman & Malla Pollack, *Callmann on Unfair Competition, Trademarks & Monopolies* § 26:3 (4th ed. 2010) (explaining that federal registration does not affect common-law trademark rights because rights in a trademark are acquired by use); 3 J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* § 19:3 (same); *cf.* 15 U.S.C. § 1056(b) (limiting effect of disclaimers to mark for which registration was sought). Roederer's registration of the '998 mark under Section 2(f) does not affect the conceptual strength of the '343 mark or the common-law CRISTAL mark.

16. Defendants also contend that Roederer's disclaimer of the words "CRISTAL CHAMPAGNE" in its registration for the '343 mark and of the word "CHAMPAGNE" in its registration for the '998 mark are admissions that the term "CRISTAL" is descriptive. The disclaimers in the registrations for the '343 and '998 marks disclaim only a claim that the registrations give Roederer "an exclusive right in those disclaimed words or symbols per se." 3 J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* § 19:63. "No disclaimer . . . shall prejudice or affect the applicant's or registrant's rights then existing or

thereafter arising in the disclaimed matter, or his right of registration on another application if the disclaimed matter be or shall have become distinctive of his goods or services.” 15 U.S.C. § 1056(b); *see also Official Airline Guides, Inc. v. Goss*, 856 F.2d 85, 87 (9th Cir. 1988) (“OAG’s disclaimer of the phrase ‘Travel Planner’ in its registration does not deprive it of any common law rights it may have in the disclaimed matter.”). The ’343 mark’s disclaimer does not affect Roederer’s rights in the ’998 mark, nor does either disclaimer affect Roederer’s rights in the common-law CRISTAL mark.

17. With respect to the conceptual strength of the ’343 and common-law marks, Roederer contends that “CRISTAL” is arbitrary as applied to champagne. Relying on the English translation of “CRISTAL” as “crystal,” Defendants maintain that “CRISTAL” is descriptive because it describes the material from which bottles of CRISTAL champagne are made.

18. Roederer does not claim rights in a CRISTAL mark for use in connection with bottles. The term “CRISTAL” identifies the source of the champagne, not of the bottle in which CRISTAL champagne is sold. “CRISTAL” is not descriptive because it does not immediately convey the ingredients, qualities, or characteristics of the champagne it identifies. *See Frosty Treats*, 426 F.3d at 1005. Champagne is neither crystal nor quartz. Moreover, “CRISTAL” is not descriptive because a competitor does not need to use the word “CRISTAL” (or “crystal”) to describe its sparkling wine. *See* 2 J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* § 11:68 (“If, however, the message conveyed by the mark about the goods or services is so direct and clear that competing sellers would be likely to need to use the term in describing or advertising their goods, then this indicates that the mark is descriptive.”).

19. “Arbitrary marks are comprised of words in common usage, but, because they do not suggest or describe any quality, ingredient, or characteristic of the goods they serve, are said to have been arbitrarily assigned.” *Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455, 464 (4th Cir. 1996). The term “CRISTAL” is not arbitrary because it suggests the sparkling quality of the champagne once it is released from the bottle. However, it requires imagination and reasoning by consumers to make the connection between the sparkle of crystal and the sparkle of champagne. Consequently, “CRISTAL” is suggestive when used in connection with champagne. *See Insty\*Bit*, 95 F.3d at 673 n.11; 2 J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* § 11:67 (“[I]f one must exercise mature thought or follow a multi-stage reasoning process to determine attributes of the product or service, the term is suggestive, not descriptive.” (quotation marks omitted)). Because the ‘343 and common-law CRISTAL marks are suggestive, they are conceptually strong.

**b. Commercial strength**

20. In the likelihood of confusion context, a mark’s commercial strength or “fame” is determined based on the “public recognition and renown” of the mark as evidenced by the extent of advertising, sales volume, features and reviews in publications, and survey evidence. *See, e.g., Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1374-76 (Fed. Cir. 2005) (considering evidence of advertising expenditures, sales volume, articles and reviews in general- and special-interest magazines in commercial strength analysis); *Insty\*Bit*, 95 F.3d at 670 (finding favorable reviews in special-interest magazines and survey evidence demonstrated the strength of plaintiff’s trade dress); *ConAgra, Inc. v. George A. Hormel & Co.*, 990 F.2d 368, 369 (8th Cir. 1993) (including “marketplace recognition value” in assessment of trademark’s strength). For purposes of the likelihood of confusion analysis, the

relevant market for evaluating commercial strength or fame is “the class of customers and potential customers of a product or service, and not the general public.” *Palm Bay Imports*, 396 F.3d at 1375. This determination is made at “the time the mark is asserted in litigation.” *Renaissance Greeting Cards, Inc. v. Dollar Tree Stores, Inc.*, 405 F. Supp. 2d 680, 690 (E.D. Va. 2005); *ConAgra, Inc. v. George & Hormel & Co.*, 784 F. Supp. 700, 707 (D. Neb. 1992).

21. With respect to the recognition and renown of the mark, Roederer has used “CRISTAL” in the United States to identify its champagne since at least 1937. CRISTAL champagne has been known by connoisseurs and those in the wine industry as one of the best champagnes since at least the 1970’s. Numerous favorable reviews in wine publications recognize the quality of CRISTAL champagne. Retailers feature CRISTAL champagne in their stores and advertisements and use it to promote their businesses. Although the sales volume of CRISTAL champagne is relatively small, it is sold in 4500 liquor stores across the United States and, with the exception of 2009, demand for CRISTAL champagne has always exceeded supply. All of these facts support a finding of a high level of commercial strength.

22. In addition, the CRISTAL brand has achieved significant recognition by the general public over the past two decades. Cuisine, wine, and general-interest magazines have reviewed CRISTAL champagne in articles and featured it on their covers. For the past two decades, CRISTAL champagne has been frequently used as a product placement in television shows and movies without Roederer paying for such placement. CRISTAL champagne has been commonly mentioned in popular novels. Although Defendants characterize them as “fleeting,” the quantity and continuity of the media mentions and product placements indicate that today’s general public recognizes CRISTAL champagne as a high-status product. Moreover, CRISTAL champagne played more than a peripheral role in some of the television shows. Finally, the



general media has commented on the extensive publicization and recognition of the CRISTAL brand due to its prominence in rap music. The general renown of CRISTAL champagne is further evidence of the commercial strength of the CRISTAL mark.

23. Defendants contend that the evidence of third-party registrations of marks and trade names including CRISTAL or similar terms is evidence of the commercial weakness of the CRISTAL marks. “[E]vidence of third party usage of similar marks on similar goods is admissible and relevant to show that the mark is relatively weak and entitled to a narrower scope of protection.” *Gen. Mills*, 824 F.2d at 626-27. Such evidence indicates a mark is entitled to a narrower scope of protection because consumers are already “conditioned” to look for minor distinctions in marks and are less likely to be confused. *See In re Mighty Leaf Tea*, 601 F.3d 1342, 1346 (Fed. Cir. 2010); *Palm Bay Imports*, 396 F.3d at 1374. However, the probative value of such third party registrations and trade names “depends entirely upon their usage.” *Palm Bay Imports*, 396 F.3d at 1373. “Third party registrations are not evidence of use so as to have conditioned the mind of prospective purchasers.” 2 J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* § 11:89 (quotation marks omitted). In the absence of evidence about the extent of the uses, the probative value of such third-party registrations and trade names is minimal. *Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 1338 (Fed. Cir. 2001); *see also* 2 J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* § 11:88 (4th ed. 2010) (“To present a more compelling case, [a] defendant should go further to show how extensive these uses are and how long they have continued.”).

24. There is no evidence of the extent of the sales or publicity of the products sold under the third-party registrations and trade names. In the absence of such evidence, the third-party registrations for and Internet availability of products including CRISTAL or similar terms

in their names do not indicate that U.S. consumers are aware of those marks, much less that they have become conditioned to distinguish between CRISTAL champagne and other alcoholic beverages having CRISTAL or similar terms in their names. *Cf. CareFirst of Md., Inc. v. First Care, P.C.*, 434 F.3d 263, 270 (4th Cir. 2006) (relying in part on investigator's report confirming that businesses identified based on trademark search reports and web page print-outs from the businesses were currently active when concluding that plaintiff's mark was not conceptually strong). Moreover, Roederer's successful enforcement of its rights in the CRISTAL marks against CRISTAL CAVA CASTELLBLANCH cava enhances the commercial strength of the CRISTAL marks. *See Morningside Group Ltd. v. Morningside Cap. Group, L.L.C.*, 182 F.3d 133, 139 (2d Cir. 1999). Consequently, the evidence of third-party registrations and Internet listings does not alter the Court's conclusion that the CRISTAL marks are commercially strong.

25. In summary, the '998 mark does not enjoy great conceptual strength because it is descriptive, but the other two CRISTAL marks are suggestive and therefore conceptually strong. Based on the general renown of CRISTAL champagne and recognition of the CRISTAL marks, all three of the CRISTAL marks are commercially strong. When the CRISTAL marks' conceptual and commercial strength are considered in combination, all three marks are "strong" for likelihood of confusion purposes. The first *SquirtCo* factor therefore weighs in favor of a finding of likelihood of confusion.

## **2. Competitive proximity**

26. The second *SquirtCo* factor requires consideration of whether the products are in competitive proximity. 628 F.2d at 1091. Although CRISTAL champagne and CRISTALINO cava do not compete directly for sales, trademark infringement may be found in the absence of direct competition. *See id.* Thus, the competitive proximity factor requires a broader

examination of the products' relationship in the market. *Kemp v. Bumble Bee Seafoods, Inc.*, 398 F.3d 1049, 1056 (8th Cir. 2005).

27. Products are in competitive proximity when there is similarity or overlap in their sales outlets, trade channels, and customers. See *Xtreme Lashes, LLC v. Xtended Beauty, Inc.*, 576 F.3d 221, 234 (5th Cir. 2009) (finding "outlet and purchaser identity" weighing in favor of likelihood of confusion where products were sold to the same class of professional beauticians and their clients and advertised through similar media channels); *In re Chatam Int'l Inc.*, 380 F.3d 1340, 1344-45 (Fed. Cir. 2004) (finding a close relationship weighing in favor of likelihood of confusion with respect to beer and tequila because they were sold through many of the same channels of trade to many of the same consumers); *Star Indus., Inc. v. Bacardi & Co.*, 412 F.3d 373, 386 (2d Cir. 2005) (finding that vodka and rum were in competitive proximity because they were sold in the same locations which were frequented by the same consumers); *J & B Wholesale Distrib., Inc. v. Redux Beverages, LLC*, 621 F. Supp. 2d 678, 685-86 (D. Minn. 2007) (finding competitive proximity based on overlapping geographic distribution and similarity of trade channels). This factor favors a finding of likelihood of confusion when it is reasonable for consumers to think the products came from the same source or are somehow affiliated. See *Kemp*, 398 F.3d at 1056; *J & B Wholesale Distrib.*, 621 F. Supp. 2d at 686; 4 J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* § 24:52 ("Even if the goods are vastly differently priced and are clearly not in competition, this does not mean that low-priced buyers have not at least heard of the expensive goods and may think that an expensive seller has expanded into a low-priced field.").

28. The sales and distribution channels of CRISTAL champagne and CRISTALINO cava overlap. Moreover, the publications in which their advertising and reviews appear target

the same educated, relatively affluent consumers, some of whom will purchase a more-expensive sparkling wine for one occasion and a less-expensive sparkling wine for another. This overlap favors a conclusion of competitive proximity. The impact of this competitive proximity on the likelihood of confusion as to association or sponsorship is not significantly affected by the differences in price and manner of display between CRISTAL champagne and CRISTALINO cava. *See Star Indus.*, 412 F.3d at 387 (finding proximity factor favored plaintiff who alleged confusion as to affiliation, sponsorship, or connection even though “[defendant’s] vodka costs half as much as [plaintiff’s] rum and is displayed on different shelves in the same store”). Finally, it is reasonable for consumers to think CRISTAL champagne and CRISTALINO cava are affiliated because it is common for wineries that produce prestige wines, including Roederer, to expand their product lines to include lower-priced products. The competitive proximity factor weighs in favor of a finding of likelihood of confusion.

### **3. Similarity of the marks**

29. Similarity of the marks supports a finding of likelihood of confusion. *SquirtCo*, 628 F.3d at 1091. In evaluating the similarity of the marks, a court considers the overall impression created by the marks, including their trade dress and visual, aural, and definitional attributes, to determine whether “the total effect conveyed by the two marks is confusingly similar.” *Luigino’s, Inc. v. Stouffer Corp.*, 170 F.3d 827, 830 (8th Cir. 1999).

30. “CRISTAL,” as the only word in the CRISTAL marks and the first portion of the CRISTALINO mark, is a dominant term in the CRISTAL and CRISTALINO marks. This dominance supports a finding of similarity. *See Palm Bay Imports*, 396 F.3d at 1372-73; *Kemp*, 398 F.3d at 1055. This similarity is increased because “CRISTAL” does not have a meaning in English other than to identify CRISTAL champagne or as a proper name. *Cf. Luigino’s*, 170

F.3d at 830 (finding marks dissimilar when dominant term “lean” was generally descriptive of food and not registerable as a trademark). Moreover, “INO” is likely to suggest to consumers that “CRISTALINO” is a diminutive of the root word “CRISTAL” or at least associate “CRISTALINO” with “CRISTAL.” The marks have some aural similarity despite the difference in accent and pronunciation of the “CRISTAL” portions. The media mentions and Internet postings describing CRISTALINO cava as CRISTAL champagne’s younger brother, pretending that CRISTALINO cava is CRISTAL champagne, and suggesting that consumers purchase CRISTALINO cava instead of CRISTAL champagne further support a finding of association and aural and phonetic similarity.<sup>9</sup>

31. Defendants suggest that the marks are distinguishable in meaning because “CRISTAL” translates to “crystal” and “CRISTALINO” translates to “crystalline.” Under the doctrine of foreign equivalents, foreign words from common languages are translated into English to determine “similarity of connotation in order to ascertain confusing similarity with English word marks.” *Palm Bay Imports*, 396 F.3d at 1377. This doctrine applies when it is likely that an American consumer “will translate the foreign mark and will take it as it is.” *Id.* To the extent that consumers would translate “CRISTAL” and “CRISTALINO” to “crystal” and “crystalline,” the different translations do not weigh against a finding of definitional similarity because the definition of “crystalline” includes “made of crystal” or “resembling crystal.” The word marks have definitional similarity.

32. In addition to considering the similarity of the word marks, the Court must “evaluate the impression that each mark in its entirety is likely to have on a purchaser exercising

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<sup>9</sup> Such calling to mind does not equate to confusion for trademark purposes. *See* 4 J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* § 23:9. The Court relies on these media mentions and Internet postings only insofar as they demonstrate similarity and linguistic association between the marks.

the attention usually given by purchasers of such products.” *See Duluth News-Tribune*, 84 F.3d at 1097. In making this comparison, the appearance of the litigated marks side by side in the courtroom does not accurately reflect market conditions. *Daddy’s Junky Music Stores, Inc. v. Big Daddy’s Family Music Center*, 109 F.3d 275, 283 (6th Cir. 1997) (quotation marks omitted). “Rather, courts must determine whether a given mark would confuse the public when viewed alone, in order to account for the possibility that sufficiently similar marks may confuse consumers who do not have both marks before them but who may have a general, vague, or even hazy, impression or recollection of the other party’s mark.” *Id.* (quotation marks omitted).

33. The CRISTAL champagne and CRISTALINO cava bottles are the same shape. Bottles of CRISTAL champagne and CRISTALINO cava have rectangular gold front labels, gold neck labels, and a gold shoulder label. Bottles of CRISTAL ROSÉ champagne and CRISTALINO ROSÉ cava have the same elements in a pink-hued copper color. The front labels prominently display the word “CRISTAL” or “CRISTALINO” in all-capital letters in a Roman serif font, as do both neck labels. Both bottles display a medallion on the front label and in the downwardly-extending region of the neck label. These common elements support a finding of similarity with respect to the overall commercial impression. In addition, Carrión’s failure to prominently display the “Jaume Serra” name (or any other distinguishing feature) on bottles of CRISTALINO cava further supports a finding of similarity. *Cf. Luigino’s*, 170 F.3d at 831 (finding that prominent display of house marks conveyed “perceptible distinctions” between products).

34. Defendants contend that the differences in the color of the bottles, the language used on the labels, the geometry of the bottles’ bases, the display of CRISTAL champagne in yellow cellophane, and the details of certain design elements, as well as the overall more-

expensive appearance of the CRISTAL bottle, mean the products' commercial impressions are dissimilar. Where the products are closely related, less similarity is required to support a finding of infringement. *ConAgra*, 990 F.2d at 371; *SquirtCo*, 628 F.2d at 1091. Moreover, the differences identified by Defendants do not weigh against the likelihood of the confusion alleged here—confusion as to association or sponsorship—because those differences exist between Roederer's CRISTAL champagne and Roederer's less-expensive sparkling wines. Indeed, the verbatim responses describing the CRISTALINO bottle as “less expensive version,” an “American knock-off,” and a “cheaper version” of the CRISTAL bottle support this conclusion. Similarly, inclusion of the “Value Brand of the Year” sticker on bottles of CRISTALINO cava is not inconsistent with the belief that the producer of CRISTAL champagne has expanded its product offering to include a less-expensive, yet relatively high-quality, sparkling wine.<sup>10</sup> This factor weighs in favor of a finding of likelihood of confusion.

#### **4. Intent**

35. Although not an element of a claim for trademark infringement, intent on the part of the alleged infringer to pass off its goods as the product of another creates an inference of likelihood of confusion. *SquirtCo*, 628 F.2d at 1091. The intent factor is relevant because it demonstrates the junior user's true opinion as to the dispositive issue of whether confusion is likely. *Kemp*, 398 F.3d at 1057.

36. Jaume Serra's use of the CRISTALINO name on still wines before introducing CRISTALINO cava to the United States in 1989 weighs against a finding of intent. Roederer

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<sup>10</sup> Defendants also rely on a February 28, 2002, letter in which Roederer's U.S. trademark counsel stated that her firm had previously determined that “the marks CRISTAL and CRISTALINO (for water by Cristal Creek) were not confusing similar.” This statement does not persuade the Court that there is no likelihood of confusion with respect to CRISTALINO when used in connection with cava, rather than water.

asserts, however, that the changes in the CRISTALINO labels between 1989 and 1993 demonstrate Jaume Serra's intent to trade off the CRISTAL name. Defendants have offered credible testimony that "JAUME SERRA" was removed from the CRISTALINO label to make it less cluttered. The Court also credits Friend's testimony that the color of the CRISTALINO BRUT label was changed from black to gold based on the Wine Max buyer's recommendation. In addition, gold labels, while not comprising the majority of sparkling wine labels, are not so rare as to require the conclusion that the color of the label was changed with the intent to copy the labels of CRISTAL champagne. Similarly, pink-hued labels for rosé sparkling wines are not uncommon. The Court concludes that the changes to the CRISTALINO labels made between 1989 and 1993 and the selection of pink-hued copper labels for CRISTALINO ROSÉ cava do not support a conclusion of intent to infringe.

37. Roederer maintains that Defendants' promotion of CRISTALINO cava as a higher-quality sparkling wine made using the traditional method with yeast from the Champagne region of France supports a finding of intent. Nothing in Defendants' promotional materials indicates any intent to link CRISTALINO cava to Roederer or CRISTAL champagne. Defendants' statements in its advertisements suggesting that consumers can avoid embarrassment by bringing CRISTALINO cava to a party do not indicate an intent to position CRISTALINO as an aspirational or French brand rather than a cava superior to other comparably-priced sparkling wines. Defendants' promotion of CRISTALINO cava does not support a finding of intent to benefit from an association with CRISTAL champagne or Roederer.

38. Roederer also asserts that Defendants are willfully indifferent to its trademark rights because Carrión did not conduct any trademark searches before using the CRISTALINO



mark on cava in the United States or respond to a cease-and-desist letter Roederer sent Carrión in 2002. Carrión's failure to conduct a trademark search does not demonstrate an intent to infringe or willful indifference to Roederer's trademark rights. *See George & Co.*, 575 F.3d at 398 ("Finally, the failure to conduct a trademark search or contact counsel shows carelessness at most, but is in any event irrelevant because knowledge of another's goods is not the same as an intent to mislead and to cause consumer confusion." (quotation marks omitted)); *see also King of the Mountain Sports, Inc. v. Chrysler Corp.*, 185 F.3d 1084, 1091-92 (10th Cir. 1999) (declining to infer intent based on failure to conduct trademark search). Similarly, Carrión's "refusal to abandon [the CRISTALINO] mark in the face of a cease and desist letter cannot demonstrate bad faith standing alone." *O'Keefe v. Ogilvy & Mather Worldwide, Inc.*, 590 F. Supp. 2d 500, 525 (S.D.N.Y. 2008); *see also Straus v. Notaseme Hosiery Co.*, 240 U.S. 179, 181 (1916) ("[T]he defendants' persistence in their use of the design after notice proves little or nothing against them."). No evidence indicates Defendants willfully disregarded Roederer's trademark rights.

39. Finally, Roederer contends that Defendants did "nothing" after receiving notice of counterfeiting in the marketplace. Roederer bases this argument on the 2004 sale of CRISTALINO cava that had been altered to resemble CRISTAL champagne to a Michigan liquor store owner. Rather than failing to respond, the distributor of CRISTALINO cava immediately informed the liquor store owner of his mistake. Defendants' failure to do more in response to this isolated instance of counterfeiting by an unknown person does not permit an inference of intent on the part of Defendants to trade off the CRISTAL mark.

40. In conclusion, the evidence does not support a finding that Defendants intended to confuse the public. This factor weighs against a finding of likelihood of confusion.

## **5. Actual confusion**

41. “[A]ctual confusion is not essential to a finding of trademark infringement, although it is positive proof of likelihood of confusion.” *SquirtCo*, 628 F.2d at 1091. Evidence of actual confusion may be presented in the form of testimony about incidents of confusion or survey evidence. *See Frosty Treats*, 426 F.3d at 1009.

### **a. Barlier’s and McCarthy’s testimony**

42. Roederer maintains that Barlier’s and McCarthy’s testimony about incidents of actual confusion weighs in favor of a likelihood of confusion. When determining whether a likelihood of confusion exists based on instances of actual confusion, weight is given to the number and extent of the instances. *Id.* Barlier and McCarthy provided very few specifics about the details of the conversations and the number of instances. Consequently, the Court gives their testimony little weight with respect to the issue of actual confusion. *See id.* at 1009-10.

43. Defendants maintain that the lack of testimony from consumers about actual confusion, in light of the twenty-year coexistence in the marketplace of CRISTAL champagne and CRISTALINO cava, weighs against a finding of likelihood of confusion. The absence of testimony from consumers about incidents of actual confusion, particularly when the products have coexisted in the marketplace for an extended period of time, can indicate that confusion is not likely. *Hubbard Feeds, Inc. v. Animal Feed Supplement, Inc.*, 182 F.3d 598, 603 (8th Cir. 1999). However, in light of CRISTALINO cava’s inexpensive price and the prohibition on direct communication between consumers and Roederer and MMD, the absence of consumer testimony about actual confusion is not significant. *See Au-Tomotive Gold, Inc. v. Volkswagen of Am., Inc.*, 457 F.3d 1062, 1077 (9th Cir. 2006) (“In this case, which involves a national market and a low degree of consumer care, nothing suggests that the lack of evidence of confusion

should be particularly noteworthy.”). Barlier’s and McCarthy’s testimony and the absence of testimony from actual consumers does not weigh in favor of or against a finding of likelihood of confusion.

**b. Survey evidence**

44. Consumer surveys are an appropriate method for producing evidence of actual confusion. *Stuart Hall*, 51 F.3d at 790. “Because manifestations of actual confusion serve as strong evidence of a likelihood of confusion, and may, in fact, be the best such evidence, [surveys] should be given substantial weight unless seriously flawed.” *Novak*, 836 F.2d at 400 (citations omitted). “The probative value of a consumer survey is a highly fact-specific determination and a court may place such weight on survey evidence as it deems appropriate.” *Johnson & Johnson-Merck Consumer Pharms. Co. v. Rhone-Poulenc Rorer Pharms., Inc.*, 19 F.3d 125, 134 (3d Cir. 1994) (quotation marks omitted).

45. Dr. Kaplan calculated a 23.1% level of confusion based on his survey results. Survey results indicating that level of confusion generally would weigh in favor of a finding of likelihood of confusion. *See Sara Lee Corp.*, 81 F.3d at 467 (“[B]ut even if the true figure were only half of the [thirty to forty percent estimated by the survey], actual confusion would, in our view, nevertheless exist to a significant degree.”); *Novak*, 836 F.2d at 400-01 (finding a 10% result from a credible survey supported a finding of likelihood of confusion); *James Burrough, Ltd. v. Sign of Beefeater, Inc.*, 540 F.2d 266, 279 (7th Cir. 1976) (“We cannot agree that 15% is ‘small.’ Though the percentage of likely confusion required may vary from case to case, we cannot consider 15%, in the context of this case, involving the entire restaurant-going

community, to be de minimus.”). Defendants, however, argue that the Kaplan survey is flawed for several reasons.<sup>11</sup>

46. Defendants first contend that the Kaplan survey improperly defined the survey universe. The survey universe is “that segment of the population whose perceptions and state of mind are relevant to the issues in the case.” *Citizens Fin. Group, Inc. v. Citizens Nat’l Bank of Evans City*, 383 F.3d 110, 118-19 (3d Cir. 2004) (quotation marks omitted). A survey of the wrong universe has little probative value. *Id.* at 119. In a “forward confusion” case such as this, the alleged confusion “occurs when customers mistakenly think that the junior user’s goods or services are from the same source as or are connected with the senior user’s goods or services.” *Sands, Taylor & Wood Co. v. Quaker Oats Co.*, 978 F.2d 947, 957 (7th Cir. 1992) (quotation marks omitted). In a forward confusion case, “the proper universe to survey is the potential buyers of the *junior user’s* goods or services.” 6 J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* § 32:159.

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<sup>11</sup> Defendants suggest that the survey is entitled to no weight because courts have criticized other surveys conducted by Dr. Kaplan or with which Dr. Kaplan was associated. Several of the criticisms in the cases cited by Defendants are inapplicable here. For example, three of the cases criticized surveys in part for failing to ask or report the responses to follow-up questions. *See Nat’l Football League Props., Inc. v. ProStyle, Inc.*, 57 F. Supp. 2d 665, 668-69 (E.D. Wis. 1999) (criticizing survey for failing to ask a follow-up question); *Novo Nordisk of N. Am., Inc. v. Eli Lilly & Co.*, No. 96 Civ. 5787, 1996 WL 497018, at \*6 & n.27 (S.D.N.Y. Aug. 30, 1996) (“Although the result of this question [indicating a confusion level of 25%] is deserving of some consideration, this Court would have given it more weight had the results to the follow-up question, which probed as to why respondents believed there was some connection, been reported.”); *ConAgra*, 784 F. Supp. at 725-28 (describing failure to ask follow-up “state of mind” question as a “major flaw”). Here, however, it is undisputed that Dr. Kaplan’s survey included appropriate follow-up questions. In another case, the interviewers did not follow the survey instructions. *See Louis Vuitton Malletier v. Dooney & Bourke*, 340 F. Supp. 2d 415, 444-46 (S.D.N.Y. 2004) (finding survey entitled to little weight in part because interviewers showed only one test wristlet, rather than the two required by the survey instructions), *rev’d on other grounds*, 454 F.3d 108 (2d Cir. 2006). No evidence indicates the interviewers in this case did not follow the instructions. In short, although Dr. Kaplan’s survey here is not without flaws, the Court declines to assign it little or no weight simply because Dr. Kaplan designed it.

47. Defendants first contend that the survey was underinclusive because respondents were limited to those already aware of CRISTAL champagne. Using Dr. Kaplan's estimate that the interviewers at each survey site would need to bring ninety people to the interview room to reach the desired number of thirty respondents per site, Defendants contend that the level of actual confusion was only one-third of 23.1%, or 7.7%. To some extent, the restriction of respondents to those already aware of CRISTAL champagne artificially inflated the confusion level measured by the survey. *See Paco Sport, Ltd. v. Paco Rabanne Parfums*, 86 F. Supp. 2d 305, 322 n.17 (S.D.N.Y. 2000) ("The Court finds Paco Rabanne's approach, limiting its universe to consumers aware of its products, inappropriate because even a weak brand could demonstrate a high degree of confusion because of the limited nature of the universe being surveyed. The Court therefore agrees with Paco Sport's expert, Mr. McCullough, that the more appropriate practice is to survey all prospective purchasers.").

48. Roederer's reliance on *IDV North America, Inc. v. S & M Brands, Inc.*, 26 F. Supp. 2d 815, 830 (E.D. Va. 1998), and similar cases in support of its exclusion of those unaware of CRISTAL champagne is unpersuasive. In those cases, courts reasoned that excluding those in the market for the senior product could increase the likelihood of confusion because those persons were more likely to know the source of the senior product did not sponsor the product identified by the junior mark. The issue here, however, is not whether those in the market for CRISTAL champagne were properly included, but rather whether those unaware of the CRISTAL mark were properly excluded. Roederer offers no plausible explanation of how persons unaware of CRISTAL champagne could be confused as to whether CRISTALINO cava was sponsored by the source of the product of which they were unaware—CRISTAL champagne. Although the exclusion of those unaware of CRISTAL champagne inflated the

likelihood of confusion estimate, there is no evidence indicating how many people it actually took to reach the desired number of thirty respondents per site. Consequently, while the Court decreases the weight given to Dr. Kaplan's survey due to the underinclusive universe, it declines to conclude that the actual confusion was 7.7%.

49. Second, Defendants assert that the \$35 price point for respondents is too high because CRISTALINO cava sells for less than \$10 in liquor stores. The screening interview determined if potential respondents had purchased or intended to purchase an imported sparkling wine for under \$35 per bottle in a liquor store or restaurant, but did not ask the potential respondents in which location they had purchased or intended to purchase the sparkling wine. Insofar as the \$35 price point captured respondents who had purchased CRISTALINO cava at restaurants, it was reasonable since CRISTALINO cava sells for between \$19 and \$32 in restaurants. The survey universe, however, was overinclusive to the extent it included respondents who had purchased an imported sparkling wine in the \$30 range at a liquor store. Relying on Dr. Simonson's testimony, Defendants contend that this overinclusiveness meant the respondents were more likely to have heard of CRISTAL champagne. To the extent this flaw increased the number of respondents who had heard of CRISTAL champagne, its effect is subsumed in the effect of restricting survey respondents to those aware of CRISTAL champagne. The Court does not further alter the weight given the survey based on this flaw.

50. Defendants next contend that the use of "COURTALINO" as a control was inadequate because the only similarity between "CRISTAL" and "COURT" is that both words begin with the letter "C." The proper comparison when determining the validity of a control is between the junior mark and the control, not between the allegedly infringing portion of the junior mark and the replacement portion of the control. *See Gov't Employees Ins. Co. v. Google*,

*Inc.*, No. 1:04CV507, 2005 WL 1903128, at \*5 (E.D. Va. Aug. 8, 2005) (criticizing control for not removing allegedly infringing elements for which GEICO wanted to measure confusion while keeping the other elements as constant as possible); 6 J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* § 32:187 (“The control question or questions should use a mark similar enough to the actual mark that it provides an accurate measure of the confusion created by the accused mark, not by some other similarity.”); Federal Judicial Center, *Reference Manual on Scientific Evidence* 258 (2d ed. 2000) (“In designing a control group study, the expert should select a stimulus for the control group that shares as many characteristics with the experimental stimulus as possible, with the key exception of the characteristic whose influence is being assessed.”). Rather than disagreeing with the appropriateness of this comparison, Defendants’ expert Dr. Simonson testified that a control should be “as similar to the junior mark, in this case, CRISTALINO, as possible, without infringing on the senior mark.”

51. With the exception of the term “CRISTAL”—the characteristic whose influence was being assessed—the names “COURTALINO” and “CRISTALINO” are very similar. Both words end in “INO,” have ten letters, and start with a “C.” In addition, “COURTALINO” shares a “TALINO” with “CRISTALINO” and shares an “R” with the “CRISTAL” portion of “CRISTALINO.” “COURTALINO” and “CRISTALINO” are very similar, and Defendants identify no alternative name that meets the criteria for a control.<sup>12</sup> Consequently, the Court concludes that Dr. Kaplan’s selection of “COURTALINO” as a control was appropriate.

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<sup>12</sup> Dr. Simonson’s testimony that Roederer should have used “CRITALINO” as its control was based on the assumption that Roederer did not believe “CRITALINO” infringed the CRISTAL mark. No evidence provides a basis for this assumption, and Roederer’s opposition to Carrión’s registration of the mark “CRESTALINO” indicates that Roederer would not agree that “CRITALINO” is non-infringing. *See* Trademark Trial and Appeal Board Opposition No. 91181686 (filed Jan. 2, 2008), *available at* <http://ttabvue.uspto.gov/ttabvue/v?pno=91181686&pty=OPP>.

52. Defendants also contend that the sequential survey methodology employed by the Kaplan survey created demand effects because it did not replicate market conditions. The Kaplan survey methodology consisted of showing potential respondents a bottle of CRISTAL champagne and, if the potential respondent was previously aware of CRISTAL champagne, removing the CRISTAL champagne bottle, creating a line-up of the other bottles, and asking a series of questions intended to determine whether confusion existed. This format has been used in cases where the products at issue are displayed in close proximity and the products directly compete. *See, e.g., Storck USA, L.P. v. Farley Candy Co.*, 797 F. Supp. 1399, 1408-09 (N.D. Ill. 1992). Because CRISTALINO cava and CRISTAL champagne do not directly compete, the sequential survey methodology did not fully reflect marketplace conditions. However, because CRISTAL champagne and CRISTALINO cava are both sparkling wines located in the same area of liquor stores and listed in the same category in brochures and wine lists, the Court concludes that the sequential survey methodology was not entirely inappropriate. *Cf. Kargo Global, Inc. v. Advance Magazine Publishers, Inc.*, No. 06 Civ. 550, 2007 WL 2258688, at \*5-7 (S.D.N.Y. Aug. 6, 2007) (finding sequential survey methodology inappropriate where no evidence indicated that prospective consumers were likely to encounter the KARGO trademark for wireless services a short time after seeing CARGO magazine).

53. Defendants contend that the demand effects are evidenced by the fact that almost 30% of the respondents said that WILLM sparkling wine was related to CRISTAL champagne because there was no reason for this level of confusion. *See Kargo Global*, 2007 WL 2258688, at \*9-10 (finding that survey created demand effects where 80% of respondents in the control group believed there was a connection between the companies that produced the control product CARRY magazine and the completely unrelated KARGO wireless services). As acknowledged



by Dr. Simonson, however, the WILLM bottle is not properly considered a control in the Kaplan survey and the respondents selecting the WILLM bottle identified the clear color of the WILLM and CRISTAL bottles as the reason for their selection. In addition, the WILLM bottle has labels that are primarily gold and a medallion on the neck label in the same location as the LR medallion on the CRISTAL bottle. Consequently, the respondents' belief that the WILLM bottle was related to the CRISTAL bottle was not unreasonable and does not indicate that the respondents were, as Dr. Simonson suggested, "looking for anything" upon which to base a relationship.

54. In addition, almost half of the respondents did not identify any bottle as related to or associated with the producer of CRISTAL champagne. Of those respondents identifying the CRISTALINO bottle based on the name, 57% of respondents selected only the CRISTALINO bottle. Eighty percent selected the CRISTALINO bottle as their first choice, while the CRISTALINO bottle was never the third or fourth bottle selected. Those statistics indicate that demand effects alone do not account for the level of confusion measured with respect to CRISTALINO cava and CRISTAL champagne.

55. In summary, the Court assigns diminished weight to the Kaplan survey based on the flaws in the survey universe and methodology. "Sometimes, [however,] the most illuminating and probative parts of a survey are not the numbers and percentages generated by the responses, but the verbatim accounts of the responses. The respondents' verbatim responses to [a] 'why' question may provide a window into consumer thought processes in a way that mere statistical data cannot." 6 J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* § 32:178; see also *AM Gen. Corp. v. DaimlerChrysler Corp.*, 311 F.3d 796, 826 (7th Cir. 2002) (relying on verbatim responses when concluding survey did not support a finding of likelihood of

confusion). The verbatim responses to the Kaplan survey indicate that a significant percentage of consumers aware of CRISTAL champagne were confused as to brand, source, sponsorship, or permission with respect to CRISTALINO cava and CRISTAL champagne based on the products' names and labeling. Therefore, despite its flaws, the Court concludes that the Kaplan survey slightly favors a finding of likelihood of confusion.

#### **6. Degree of care**

56. The likelihood of confusion determination also takes into account the degree of care exercised by the purchasers, which requires consideration of the type of product, its cost, and conditions of purchase. *SquirtCo*, 628 F.2d at 1091. The Court must “stand in the shoes of the ordinary purchaser, buying under the normally prevalent conditions of the market and giving the attention such purchasers usually give in buying that class of goods.” *Luigino's*, 170 F.3d at 832 (quotation marks omitted).

57. In general, purchasers of wine and sparkling wine are unsophisticated and rely on familiarity with brands and the information conveyed by the labels when purchasing a less-expensive product. To the extent distinguishing characteristics exist between bottles of CRISTALINO cava and CRISTAL champagne, such as the use of French or Spanish on the label and the difference in price, those characteristics are unlikely to prevent confusion as to association or sponsorship given the similarity of the products' names and the commonplace practice of marketing sparkling wines at a variety of price points by premier champagne houses, including Roederer. *See Palm Bay Imports*, 396 F.3d at 1376 (“And even more sophisticated purchasers might be aware that champagne houses offer both types of products under similar marks, and could easily conclude that VEUVE ROYALE was Veuve Clicquot’s sparkling wine.”); *see also Daddy’s Junky Music Stores*, 109 F.3d at 286 (“[C]onfusingly similar marks

may lead a purchaser who is extremely careful and knowledgeable about the instrument that he is buying to assume nonetheless that the seller is affiliated with or identical to the other party.”).

Consequently, the degree of care factor favors a finding of likelihood of confusion.

#### **7. Conclusion as to likelihood of confusion**

58. In summary, the CRISTAL marks are strong, the names “CRISTAL” and “CRISTALINO” are similar, and the addition of “INO” to “CRISTAL” to form “CRISTALINO” suggests a connection between the two products. CRISTAL champagne and CRISTALINO cava have similarly-colored labels on which their names are displayed in similar fonts. The CRISTALINO bottle does not prominently display “JAUME SERRA,” a house mark, or any other distinguishing characteristic. CRISTALINO cava and CRISTAL champagne are in competitive proximity, and consumers exercise a low degree of care when purchasing CRISTALINO cava. All of these factors weigh in favor of a likelihood of confusion that, because it is reasonable for consumers to believe that the source of CRISTAL champagne would expand into a lower-priced sparkling wine category, is not offset by the differences in price, packaging, and country of origin.

59. The United States Court of Appeals for the Ninth Circuit explained this type of confusion as follows:

[T]here may not be one in a hundred buyers of this whisky who knows that it is made [and wholesaled by the plaintiffs]. Probably all that such buyers know is that Black & White Scotch whisky has satisfied them in the past or that they have heard of it and the average purchaser would no doubt select for the use of his guests something with which he was familiar and thus purchase Black & White whisky. . . . It is our view, and we so hold, that the average purchaser, as the courts have described him, would be likely to believe, as he noted the Black & White beer in [defendant’s] stores, that the maker of the beer had some connection with the concern which had produced the well known Black & White Scotch whisky.

*Fleischmann Distilling Corp. v. Maier Brewing Co.*, 314 F.2d 149, 155 (9th Cir. 1963).

Similarly, while purchasers and potential purchasers of CRISTALINO cava may not know that Roederer produces CRISTAL champagne, the Court's analysis of the *SquirtCo* factors indicates that an appreciable number of those purchasers are likely to be confused as to whether the producer of CRISTAL champagne is associated with, sponsors, or approves of CRISTALINO cava.<sup>13</sup> Roederer has proved its claims of trademark infringement and unfair competition under the Lanham Act and Minnesota law.

### III. Trademark dilution

60. Roederer asserts a claim of trademark dilution pursuant to 15 U.S.C. § 1125(c), which provides that “the owner of a famous mark that is distinctive . . . shall be entitled to an injunction against another person who, at any time after the owner's mark has become famous, commences use of a mark or trade name in commerce that is likely to cause dilution.”<sup>14</sup>

Accordingly, to succeed on a claim of trademark dilution, Roederer must prove the CRISTAL marks were famous before Jaume Serra began its use in commerce of the CRISTALINO mark.

61. Roederer maintains that the relevant date for the determination of fame is 1993 because sales of CRISTALINO cava in the United States before that year were “*de minimus*.” Roederer also argues that, although Jaume Serra's first sales in the United States of cava bearing the CRISTALINO name began in 1989, the alleged diluting use did not begin until Jaume Serra

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<sup>13</sup> Defendants argue that Roederer has not shown post-sale confusion. “Post-sale confusion refers not to the resale of the original product . . . but to the risk that non-purchasers, who themselves may be future consumers, will be deceived.” *I.P. Lund Trading ApS v. Kohler Co.*, 163 F.3d 27, 44 (1st Cir. 1998). The Court does not address this argument because Roederer does not assert post-sale confusion.

<sup>14</sup> The Trademark Dilution Revision Act (TDRA) of 2006 applies to Roederer's dilution claims because Roederer seeks only injunctive relief. *See Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 477 F.3d 765, 766 (2d Cir. 2007).

removed “JAUME SERRA” from the labels of CRISTALINO cava in 1993. The caselaw does not support a “*de minimus*” exception to federal anti-dilution law.<sup>15</sup> See *Enter. Rent-A-Car Co. v. Advantage Rent-A-Car, Inc.*, 330 F.3d 1333, 1342 (Fed. Cir. 2003) (“[I]t is significant that there is no qualification in the statute requiring that the defendant’s prior use be substantial or cover a wide geographic area to defeat an injunction under the statute.”). In addition, “any commercial use of a famous mark in commerce is arguably a diluting use that fixes the time by which famousness is to be measured.” *Nissan Motor Co. v. Nissan Computer Corp.*, 378 F.3d 1002, 1013 (9th Cir. 2004). Nevertheless, the Court need not decide whether 1989 or 1993 is the date by which fame should be measured because, for the reasons set forth below, the Court concludes that the CRISTAL marks were not famous within the meaning of § 1125(c) in either year.

62. Fame for dilution purposes and fame for likelihood of confusion purposes are distinct concepts in that “dilution fame is an either/or proposition” while likelihood of confusion fame varies from very strong to very weak. *Palm Bay Imports*, 396 F.3d at 1374-75. A mark is “famous” for dilution purposes if the mark “is widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark’s owner.” 15 U.S.C. § 1125(c)(2)(A). A mark that is famous only within a niche market does not qualify as “famous” within the meaning of § 1125(c). In determining whether a mark is famous, a court may consider all relevant factors, including (1) the duration, extent, and geographic reach of advertising and publicity of the mark, whether advertised or publicized by the owner or third parties, (2) the amount, volume, and geographic extent of sales of goods offered under the mark,

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<sup>15</sup> The passage of the TDRA does not affect this analysis. See 4 J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* § 24:103 (“[T]he old and new statutory requirements of the timing of the acquisition of fame are the same. Therefore, the case law under the 1996 version should remain precedential under the 2006 statute.”).

(3) the extent of actual recognition of the mark, and (4) whether the mark was registered under the Act of March 3, 1881, or the Act of February 20, 1905, or on the Principal Register. *Id.*

63. With respect to the duration, extent, and geographic reach of advertising and publicity of the CRISTAL marks, the advertising of CRISTAL champagne before 1993 was minimal. Although CRISTAL champagne benefited from a certain level of unsolicited publicity, most of the media mentions were in special-interest publications directed to the wine industry or related industries. Similarly, most references to CRISTAL champagne in general-interest publications were peripheral to the focus of the article while depictions of CRISTAL champagne in general-interest publications showed the bottle in conjunction with other luxury goods or only a portion of the bottle. “Many products receive broad incidental media coverage. Such promotion does not lead to the conclusion that their trademarks have become a part of the collective national consciousness.” *Thane Int’l, Inc. v. Trek Bicycle Corp.*, 305 F.3d 894, 912 (9th Cir. 2002). While CRISTAL champagne had celebrity “ambassadors” prior to 1993, no evidence indicates how often those ambassadors promoted CRISTAL champagne or how many people such promotions reached. The advertising and publicity of the CRISTAL marks prior to 1993 does not support a finding of fame because it primarily reached those in the wine industry or related industries.

64. The second relevant factor is the amount, volume, and extent of sales of CRISTAL champagne. 15 U.S.C. § 1125(c)(2)(A)(ii). Roederer sold \* \* \* bottles of CRISTAL champagne in 1989 and \* \* \* bottles in 1993. This sales volume is small compared to that of a mass-merchandise product. However, the fact that demand for CRISTAL champagne exceeded its supply contributed to its status as a prestige champagne. *See* 4 J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* § 24:106 (“[I]t should be noted that a lack of a

large scale of sales need not always signal a lack of fame.”). This factor is neutral with respect to fame.

65. As to the third factor, recognition of the mark, although CRISTAL champagne was recognized as a high-quality product by those in the wine industry and related industries, the evidence does not support a finding of recognition of the CRISTAL mark by the general public prior to 1993. Roederer offered no evidence of any explicit recognition of the CRISTAL brand’s power in the years preceding 1993, and CRISTAL champagne was seldom the focus of an article or picture in a general-interest publication. In addition, there is no evidence of the effect CRISTAL champagne’s celebrity ambassadors had on the general public. This factor weighs against a finding of fame.

66. Finally, the registration of the ‘343 and ‘998 marks on the Principal Register weighs in favor of a finding of fame. However, “[o]ne cannot logically infer fame from the fact that a mark is one of the millions on the federal Register.” 4 J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* § 24:106.

67. The Court’s consideration of the relevant factors indicates that the fame of the CRISTAL marks before 1993 was a “niche fame.” Because Roederer has not proven that the CRISTAL marks were famous within the meaning of § 1125(c) before 1993, Roederer’s trademark dilution claim fails.

#### **IV. Attorney fees**

68. Roederer seeks attorney fees under 15 U.S.C. § 1117(a), which provides that a court may award attorney fees to the prevailing party in a trademark infringement case if the case is exceptional. A case is exceptional if the infringer’s actions were malicious, fraudulent, deliberate, or willful. *Venture Tape Corp. v. McGills Glass Warehouse*, 540 F.3d 56, 64 (1st Cir.

2008). Roederer's argument for attorney fees is based on the same acts it claims demonstrate Defendants' intent to infringe.

69. The Court previously concluded that Defendants had no intent to trade off the CRISTAL marks. Nothing indicates that Defendants' defense against Roederer's claims of trademark infringement, unfair competition, and trademark dilution was not in good faith, and Roederer has presented no other evidence indicating that that Defendants' conduct was malicious, fraudulent, deliberate, or willful. In such a case, attorney fees are not warranted. *See Lindy Pen Co. v. Bic Pen Corp.*, 982 F.2d 1400, 1409-10 (9th Cir. 1993) (affirming district court's denial of attorney fees where infringement not intentional and nothing else made case exceptional). The Court denies Roederer's request for attorney fees under 15 U.S.C. § 1117(a).

## **V. Injunctive Relief**

70. Roederer seeks a permanent injunction pursuant to 15 U.S.C. § 1116(a) and Minn. Stat. § 325D.45(1) barring Defendants from using the name CRISTALINO or any other mark, word, or name similar to the trademarks of Roederer that is likely to cause confusion, mistake, or deception. The Court may issue a permanent injunction if Roederer proves (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for the injury; (3) that, considering the balance of hardships between the plaintiff and defendant, an equitable remedy is warranted; and (4) that the public interest would not be disserved by a permanent injunction. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

71. Roederer's CRISTAL marks "represent[] intangible assets such as reputation and goodwill." *Gen. Mills*, 824 F.2d at 625. The reputation of CRISTAL champagne as a high-quality product is unquestionable, and Roederer has developed and protected that reputation and



the goodwill associated with it since at least the 1950's. Roederer's inability to control the quality of CRISTALINO cava constitutes irreparable injury regardless of its quality. *See Opticians Ass'n of Am. v. Indep. Opticians of Am.*, 920 F.2d 187, 195-96 (3d Cir. 1990) ("If another uses [the plaintiff's mark], he borrows the owner's reputation, whose quality no longer lies within his own control. This is an injury, even though the borrower does not tarnish it, or divert any sales by its use."); *Gen. Mills*, 824 F.2d at 625. Monetary damages are inadequate to compensate Roederer for the harm to its goodwill and reputation. *See Medicine Shoppe Int'l, Inc. v. S.B.S. Pill Dr., Inc.*, 336 F.3d 801, 805 (8th Cir. 2003) ("Harm to reputation and goodwill is difficult, if not impossible, to quantify in terms of dollars."). The first two requirements of *eBay* support entry of a permanent injunction.

72. Defendants will be harmed by entry of a permanent injunction because they have acquired significant goodwill associated with the CRISTALINO brand. However, Defendants had a duty to select a trademark that would avoid confusion. *See Wesley-Jessen Div. of Schering Corp. v. Bausch & Lomb Inc.*, 698 F.2d 862, 867 (7th Cir. 1983). Despite this duty, Jaume Serra and Defendants conducted no investigation into whether their use of CRISTALINO on cava could infringe another's trademark rights, and had notice of Roederer's objections to their use of the CRISTALINO mark in the 1990's. *See Champagne Louis Roederer*, 569 F.3d at 860-61. Accordingly, Defendants' injury is discounted because, to some extent, they brought the injury upon themselves. *See Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 290 F.3d 578, 596 (3d Cir. 2002). The Court concludes that the balance of the harms supports entry of a permanent injunction.

73. Finally, the public interest would not be disserved by entry of an injunction. Rather, "the public interest is served by preventing consumer confusion in the marketplace."

*Davidoff & CIE, S.A. v. PLD Int'l Corp.*, 263 F.3d 1297, 1304 (11th Cir. 2001). Based on its analysis of the *eBay* factors, the Court finds that a permanent injunction is appropriate.

74. A permanent injunction in a trademark case should be narrowly tailored to fit specific legal violations and should not impose unnecessary burdens on lawful activity. *Patsy's Brand, Inc. v. I.O.B. Realty, Inc.*, 317 F.3d 209, 220 (2d Cir. 2003); *see also Jim Beam Brands Co. v. Beamish & Crawford Ltd.*, 937 F.2d 729, 737 (2d Cir. 1991) (explaining that an injunction in a trademark infringement case must be appropriately tailored to avoid confusion in the marketplace). An injunction mandating use of a disclaimer or house mark may be an appropriate remedy. *See A & H Sportswear Inc. v. Victoria's Secret Stores, Inc.*, 166 F.3d 197, 208 (3d Cir. 1999). In addition, an injunction specifying the use of certain fonts and font sizes and the prominence of certain phrases may be appropriate. *See, e.g., Patsy's Brand*, 317 F.3d at 220-21 (modifying injunction to permit defendants to use phrase in no greater than 10-point type, in font dissimilar to the plaintiff's font, and only as a "minor component of the labeling"); *Scarves by Vera, Inc. v. Todo Imports Ltd.*, 544 F.2d 1167, 1175 (2d Cir. 1976) (permitting defendant to use its tradename "in small type, but only in conjunction with other words which prevent any likelihood of confusion"); *Am. Ass'n for Advancement of Sci. v. Hearst Corp.*, 498 F. Supp. 244, 264-65 (D.D.C. 1980) (enjoining defendant from publishing its magazine *Science Digest* "with undue prominence given to the word 'Science' or with the word 'Digest' occupying less than seventy-five (75) percent of the area occupied by the word 'Science' on the cover of the magazine or anywhere else that the title is presented").

75. Here, the total effect conveyed by the marks is confusingly similar because "CRISTAL" is the first and dominant portion of the CRISTALINO mark, the marks are printed in similar Roman serif fonts and used on similarly-colored labels on bottles of sparkling wine,

and there is no prominent reference to the Jaume Serra winery (or any other distinguishing feature) on the labels of the CRISTALINO bottles. An injunction completely barring use of the word “CRISTALINO” is unnecessary to prevent consumer confusion. Rather, Defendants may use the term “CRISTALINO” in connection with the manufacture, importation, distribution, advertisement, promotion, sale, or offering for sale of cava or sparkling wine only as part of the phrase “JAUME SERRA CRISTALINO” and only in conjunction with a prominent disclaimer stating that “JAUME SERRA CRISTALINO is not affiliated with, sponsored by, approved by, endorsed by, or in any way connected to Louis Roederer’s CRISTAL® champagne or Louis Roederer.” The phrase “JAUME SERRA CRISTALINO” shall only be displayed in a font dissimilar to the Roman serif font used for the word “CRISTAL” on bottles of CRISTAL champagne and only when the words “JAUME SERRA” are displayed in close proximity to the word “CRISTALINO,” in the same font as the word “CRISTALINO,” and in a font size at least as large as the font size of the word “CRISTALINO.” Moreover, when used on bottles of cava, the phrase “JAUME SERRA CRISTALINO” shall only be used on labels having a background color other than gold if the cava is a brut, dry, extra-dry, or semi-dry and other than a pink-hued copper if the cava is a rosé.<sup>16</sup>

76. The same restrictions apply to Defendants’ use of any mark, word, or name similar to the CRISTALINO name that is likely to cause confusion, mistake, or deception with Roederer’s CRISTAL marks in connection with the manufacture, importation, distribution,

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<sup>16</sup> While the scope of this injunction may not prevent persons from joking about the similarity between the names CRISTAL and CRISTALINO, such persons are not confused about whether the source of CRISTAL champagne has sponsored, endorsed, approved of, or is otherwise affiliated with CRISTALINO cava. Similarly, while the injunction does not require restaurants and bars to include the entire phrase “JAUME SERRA CRISTALINO” on their wine lists, the evidence at trial indicated that, while CRISTALINO cava and CRISTAL champagne do appear on the same wine lists, such occurrences are infrequent.

advertisement, promotion, sale, or offering for sale of cava or sparkling wine. Although Defendants may continue to sell their existing inventory of already-labeled bottles of CRISTALINO cava, they must destroy all labels, signs, prints, packages, wrappers, receptacles, and advertisements in their possession bearing the mark CRISTALINO, and all plates, molds, matrices, and other means for making the same, that do not conform with these requirements.

### **CONCLUSION**

Based on the submissions of the parties, the arguments of counsel, and the entire file and proceedings herein, the Court finds in favor of Roederer on its trademark infringement and unfair competition claims (Counts I-IV) and against Roederer on its trademark dilution claim (Count V). The Court issued a separate Order and Injunction [Docket No. 328] consistent with these Non-Confidential Findings of Fact and Non-Confidential Conclusions of Law on July 27, 2010.

Dated: August 10, 2010

s/ Joan N. Ericksen  
JOAN N. ERICKSEN  
United States District Judge

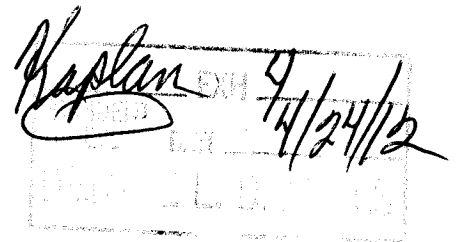
# Reference Guide on Survey Research

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## I. Introduction

Surveys are used to describe or enumerate objects or the beliefs, attitudes, or behavior of persons or other social units.<sup>1</sup> Surveys typically are offered in legal proceedings to establish or refute claims about the characteristics of those objects, individuals, or social units. Although surveys may count or measure every member of the relevant population (e.g., all plaintiffs eligible to join in a suit, all employees currently working for a corporation, all trees in a forest), sample surveys count or measure only a portion of the objects, individuals, or social units that the survey is intended to describe.<sup>2</sup>

Some statistical and sampling experts apply the phrase “sample survey” only to a survey in which probability sampling techniques are used to select the sample.<sup>3</sup> Although probability sampling offers important advantages over nonprobability sampling,<sup>4</sup> experts in some fields (e.g., marketing) regularly rely on various forms of nonprobability sampling when conducting surveys. Consistent with Federal Rule of Evidence 703, courts generally have accepted such evidence.<sup>5</sup> Thus, in this reference guide, both the probability sample and the nonprobability sample are discussed. The strengths of probability sampling and the weaknesses of various types of nonprobability sampling are described so that the trier of fact can consider these features in deciding what weight to give to a particular sample survey.

As a method of data collection, surveys have several crucial potential advantages over less systematic approaches.<sup>6</sup> When properly designed, executed, and

1. Social scientists describe surveys as “conducted for the purpose of collecting data from individuals about themselves, about their households, or about other larger social units.” Peter H. Rossi et al., *Sample Surveys: History, Current Practice, and Future Prospects*, in *Handbook of Survey Research* 1, 2 (Peter H. Rossi et al. eds., 1983). Used in its broader sense, however, the term *survey* applies to any description or enumeration, whether or not a person is the source of this information. Thus, a report on the number of trees destroyed in a forest fire might require a survey of the trees and stumps in the damaged area.

2. In *J.H. Miles & Co. v. Brown*, 910 F. Supp. 1138 (E.D. Va. 1995), clam processors and fishing vessel owners sued the Secretary of Commerce for failing to use the unexpectedly high results from 1994 survey data on the size of the clam population to determine clam fishing quotas for 1995. The estimate of clam abundance is obtained from surveys of the amount of fishing time the research survey vessels require to collect a specified yield of clams in major fishing areas over a period of several weeks. *Id.* at 1144–45.

3. E.g., Leslie Kish, *Survey Sampling* 26 (1965).

4. See *infra* § III.C.

5. Fed. R. Evid. 703 recognizes facts or data “of a type reasonably relied upon by experts in the particular field . . . .”

6. This does not mean that surveys can be relied on to address all types of questions. For example, some respondents may not be able to predict accurately whether they would volunteer for military service if Washington, D.C., were to be bombed. Their inaccuracy may arise not because they are unwilling to answer the question or to say they don’t know, but because they believe they can predict accurately, and they are simply wrong. Thus, the availability of a “don’t know” option cannot cure the inaccuracy. Although such a survey is suitable for assessing their predictions, it may not provide a very accurate estimate of what their actual responses would be.

described, surveys (1) economically present the characteristics of a large group of objects or respondents and (2) permit an assessment of the extent to which the measured objects or respondents are likely to adequately represent a relevant group of objects, individuals, or social units.<sup>7</sup> All questions asked of respondents and all other measuring devices used can be examined by the court and the opposing party for objectivity, clarity, and relevance, and all answers or other measures obtained can be analyzed for completeness and consistency. To make it possible for the court and the opposing party to closely scrutinize the survey so that its relevance, objectivity, and representativeness can be evaluated, the party proposing to offer the survey as evidence should describe in detail the design and execution of the survey.

The questions listed in this reference guide are intended to assist judges in identifying, narrowing, and addressing issues bearing on the adequacy of surveys either offered as evidence or proposed as a method for developing information.<sup>8</sup> These questions can be (1) raised from the bench during a pretrial proceeding to determine the admissibility of the survey evidence; (2) presented to the contending experts before trial for their joint identification of disputed and undisputed issues; (3) presented to counsel with the expectation that the issues will be addressed during the examination of the experts at trial; or (4) raised in bench trials when a motion for a preliminary injunction is made to help the judge evaluate what weight, if any, the survey should be given.<sup>9</sup> These questions are intended to improve the utility of cross-examination by counsel, where appropriate, not to replace it.

All sample surveys, whether they measure objects, individuals, or other social units, should address the issues concerning purpose and design (section II), population definition and sampling (section III), accuracy of data entry (section VI), and disclosure and reporting (section VII). Questionnaire and interview surveys raise methodological issues involving survey questions and structure (section IV) and confidentiality (section VII.C), and interview surveys introduce additional issues (e.g., interviewer training and qualifications) (section V). The sections of this reference guide are labeled to direct the reader to those topics that are relevant to the type of survey being considered. The scope of this reference guide is necessarily limited, and additional issues might arise in particular cases.

7. The ability to quantitatively assess the limits of the likely margin of error is unique to probability sample surveys.

8. See *infra* text accompanying note 27.

9. Lanham Act cases involving trademark infringement or deceptive advertising frequently require expedited hearings that request injunctive relief, so judges may need to be more familiar with survey methodology when considering the weight to accord a survey in these cases than when presiding over cases being submitted to a jury. Even in a case being decided by a jury, however, the court must be prepared to evaluate the methodology of the survey evidence in order to rule on admissibility. See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993).



### A. Use of Surveys in Court

Forty years ago the question whether surveys constituted acceptable evidence still was unsettled.<sup>10</sup> Early doubts about the admissibility of surveys centered on their use of sampling techniques<sup>11</sup> and their status as hearsay evidence.<sup>12</sup> Federal Rule of Evidence 703 settled both matters for surveys by redirecting attention to the “validity of the techniques employed.”<sup>13</sup> The inquiry under Rule 703 focuses on whether facts or data are “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.”<sup>14</sup> For a survey, the question becomes, “Was the poll or survey conducted in accordance with generally accepted survey principles, and were the results used in a

10. Hans Zeisel, *The Uniqueness of Survey Evidence*, 45 Cornell L.Q. 322, 345 (1960).

11. In an early use of sampling, Sears, Roebuck & Co. claimed a tax refund based on sales made to individuals living outside city limits. Sears randomly sampled 33 of the 826 working days in the relevant working period, computed the proportion of sales to out-of-city individuals during those days, and projected the sample result to the entire period. The court refused to accept the estimate based on the sample. When a complete audit was made, the result was almost identical to that obtained from the sample. *Sears, Roebuck & Co. v. City of Inglewood*, tried in Los Angeles Superior Court in 1955, is described in R. Clay Sprowls, *The Admissibility of Sample Data into a Court of Law: A Case History*, 4 UCLA L. Rev. 222, 226–29 (1956–1957).

12. Judge Wilfred Feinberg’s thoughtful analysis in *Zippo Manufacturing Co. v. Rogers Imports, Inc.*, 216 F. Supp. 670, 682–83 (S.D.N.Y. 1963), provides two alternative grounds for admitting opinion surveys: (1) surveys are not hearsay because they are not offered in evidence to prove the truth of the matter asserted; and (2) even if they are hearsay, they fall under one of the exceptions as a “present sense impression.” In *Schering Corp. v. Pfizer Inc.*, 189 F.3d 218 (2d Cir. 1999), the Second Circuit distinguished between perception surveys designed to reflect the present sense impressions of respondents and “memory” surveys designed to collect information about a past occurrence based on the recollections of the survey respondents. The court in *Schering* suggested that if a survey is offered to prove the existence of a specific idea in the public mind, then the survey does constitute hearsay evidence. As the court observed, Federal Rule of Evidence 803(3), creating “an exception to the hearsay rule for such statements [i.e., state of mind expressions] rather than excluding the statements from the definition of hearsay, makes sense only in this light.” *Id.* at 230 n.3.

Two additional exceptions to the hearsay exclusion can be applied to surveys. First, surveys may constitute a hearsay exception if the survey data were collected in the normal course of a regularly conducted business activity, unless “the source of information or the method or circumstances of preparation indicate lack of trustworthiness.” Fed. R. Evid. 803(6); see also *Ortho Pharm. Corp. v. Cosprophar, Inc.*, 828 F. Supp. 1114, 1119–20 (S.D.N.Y. 1993) (marketing surveys prepared in the course of business were properly excluded due to lack of foundation from a person who saw the original data or knew what steps were taken in preparing the report), *aff’d*, 32 F.3d 690 (2d Cir. 1994). In addition, if a survey shows guarantees of trustworthiness equivalent to those in other hearsay exceptions, it can be admitted if the court determines that the statement is offered as evidence of a material fact, it is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and admissibility serves the interests of justice. Fed. R. Evid. 807; e.g., *Keith v. Volpe*, 618 F. Supp. 1132 (C.D. Cal. 1985); *Schering*, 189 F.3d at 232. Admissibility as an exception to the hearsay exclusion thus depends on the trustworthiness of the survey.

13. Fed. R. Evid. 703 advisory committee’s note.

14. Fed. R. Evid. 703.

statistically correct way?”<sup>15</sup> This focus on the adequacy of the methodology used in conducting and analyzing results from a survey is also consistent with the Supreme Court’s discussion of admissible scientific evidence in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>16</sup>

Because the survey method provides an economical and systematic way to gather information about a large number of individuals or social units, surveys are used widely in business, government, and, increasingly, administrative settings and judicial proceedings. Both federal and state courts have accepted survey evidence on a variety of issues. In a case involving allegations of discrimination in jury panel composition, the defense team surveyed prospective jurors to obtain age, race, education, ethnicity, and income distribution.<sup>17</sup> Surveys of employees or prospective employees are used to support or refute claims of employment discrimination.<sup>18</sup> In ruling on the admissibility of scientific claims, courts have examined surveys of scientific experts to assess the extent to which the theory or technique has received widespread acceptance.<sup>19</sup> Some courts have admitted surveys in obscenity cases to provide evidence about community standards.<sup>20</sup> Requests for a change of venue on grounds of jury pool bias often are backed by evidence from a survey of jury-eligible respondents in the area of the original venue.<sup>21</sup> The plaintiff in an antitrust suit conducted a survey to assess what characteristics, including price, affected consumers’ preferences. The sur-

15. Manual for Complex Litigation § 2.712 (1982). Survey research also is addressed in the Manual for Complex Litigation, Second § 21.484 (1985) [hereinafter MCL 2d] and the Manual for Complex Litigation, Third § 21.493 (1995) [hereinafter MCL 3d]. Note, however, that experts who collect survey data, along with the professions that rely on those surveys, may differ in some of their methodological standards and principles. An assessment of the precision of sample estimates and an evaluation of the sources and magnitude of likely bias are required to distinguish methods that are acceptable from methods that are not.

16. 509 U.S. 579 (1993). See also *General Elec. Co. v. Joiner*, 522 U.S. 136, 147 (1997).

17. *People v. Harris*, 679 P.2d 433 (Cal.), cert. denied, 469 U.S. 965 (1984).

18. *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264, 1308 (N.D. Ill. 1986), *aff’d*, 839 F.2d 302 (7th Cir. 1988); *Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259, 326 (N.D. Cal. 1992); *Richardson v. Quik Trip Corp.*, 591 F. Supp. 1151, 1153 (S.D. Iowa 1984).

19. *United States v. Scheffer*, 523 U.S. 303, 309 (1998); *Meyers v. Arcudi*, 947 F. Supp. 581, 588 (D. Conn. 1996); *United States v. Varoudakis*, No. 97-10158, 1998 WL 151238 (D. Mass. Mar. 27, 1998); *United States v. Bishop*, 64 F. Supp. 2d 1149 (D. Utah 1999); *United States v. Orians*, 9 F. Supp. 2d 1168, 1174 (D. Ariz. 1998) (all cases in which courts determined, based on the inconsistent reactions revealed in several surveys, that the polygraph test has failed to achieve general acceptance in the scientific community).

20. E.g., *People v. Page Books, Inc.*, 601 N.E.2d 273, 279-80 (Ill. App. Ct. 1992); *People v. Nelson*, 410 N.E.2d 476, 477-79 (Ill. App. Ct. 1980); *State v. Williams*, 598 N.E.2d 1250, 1256-58 (Ohio Ct. App. 1991).

21. E.g., *United States v. Eagle*, 586 F.2d 1193, 1195 (8th Cir. 1978); *United States v. Tokars*, 839 F. Supp. 1578, 1583 (D. Ga. 1993), *aff’d*, 95 F.3d 1520 (11th Cir. 1996); *Powell v. Superior Court*, 283 Cal. Rptr. 777, 783 (Ct. App. 1991).

vey was offered as one way to estimate damages.<sup>22</sup> A routine use of surveys in federal courts occurs in Lanham Act<sup>23</sup> cases, where the plaintiff alleges trademark infringement<sup>24</sup> or claims that false advertising<sup>25</sup> has confused or deceived consumers. The pivotal legal question in such cases virtually demands survey research because it centers on consumer perception and memory (i.e., is the consumer likely to be confused about the source of a product, or does the advertisement imply an inaccurate message?).<sup>26</sup> In addition, survey methodology has been used creatively to assist federal courts in managing mass torts litigation. Faced with the prospect of conducting discovery concerning 10,000 plaintiffs, the plaintiffs and defendants in *Wilhoite v. Olin Corp.*<sup>27</sup> jointly drafted a discovery survey that was administered in person by neutral third parties, thus replacing interrogatories and depositions. It resulted in substantial savings in both time and cost.

### B. A Comparison of Survey Evidence and Individual Testimony

To illustrate the value of a survey, it is useful to compare the information that can be obtained from a competently done survey with the information obtained

22. *Dolphin Tours, Inc. v. Pacifico Creative Servs., Inc.*, 773 F.2d 1506, 1508 (9th Cir. 1985). See also *SMS Sys. Maintenance Servs., Inc. v. Digital Equip. Corp.*, 188 F.3d 11 (1st Cir. 1999); Benjamin F. King, *Statistics in Antitrust Litigation*, in *Statistics and the Law* 49 (Morris H. DeGroot et al. eds., 1986). Surveys also are used in litigation to help define relevant markets. In *United States v. E.I. DuPont de Nemours & Co.*, 118 F. Supp. 41, 60 (D. Del. 1953), *aff'd*, 351 U.S. 377 (1956), a survey was used to develop the "market setting" for the sale of cellophane. In *Mukand, Ltd. v. United States*, 937 F. Supp. 910 (Ct. Int'l Trade 1996), a survey of purchasers of stainless steel wire rods was conducted to support a determination of competition and fungibility between domestic and Indian wire rod.

23. Lanham Act § 43(a), 15 U.S.C. § 1125(a) (1946) (amended 1992).

24. *E.g.*, *Union Carbide Corp. v. Ever-Ready, Inc.*, 531 F.2d 366 (7th Cir.), *cert. denied*, 429 U.S. 830 (1976); *Qualitex Co. v. Jacobson Prods. Co.*, No. CIV-90-1183HLH, 1991 U.S. Dist. LEXIS 21172 (C.D. Cal. Sept. 3, 1991), *aff'd in part & rev'd on other grounds*, 13 F.3d 1297 (9th Cir. 1994), *rev'd on other grounds*, 514 U.S. 159 (1995). According to Neal Miller, *Facts, Expert Facts, and Statistics: Descriptive and Experimental Research Methods in Litigation*, 40 Rutgers L. Rev. 101, 137 (1987), trademark law has relied on the institutionalized use of statistical evidence more than any other area of the law.

25. *E.g.*, *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1142-43 (9th Cir. 1997); *American Home Prods. Corp. v. Johnson & Johnson*, 577 F.2d 160 (2d Cir. 1978).

26. Courts have observed that "the court's reaction is at best not determinative and at worst irrelevant. The question in such cases is, what does the person to whom the advertisement is addressed find to be the message?" *American Brands, Inc. v. R.J. Reynolds Tobacco Co.*, 413 F. Supp. 1352, 1357 (S.D.N.Y. 1976). The wide use of surveys in recent years was foreshadowed in *Triangle Publications, Inc. v. Rohrlich*, 167 F.2d 969, 974 (2d Cir. 1948) (Frank, J., dissenting). Called on to determine whether a manufacturer of girdles labeled "Miss Seventeen" infringed the trademark of the magazine *Seventeen*, Judge Frank suggested that, in the absence of a test of the reactions of "numerous girls and women," the trial court judge's finding as to what was likely to confuse was "nothing but a surmise, a conjecture, a guess," noting that "neither the trial judge nor any member of this court is (or resembles) a teen-age girl or the mother or sister of such a girl." *Id.* at 976-77.

27. No. CV-83-C-5021-NE (N.D. Ala. filed Jan. 11, 1983). The case ultimately settled before trial. See Francis E. McGovern & E. Allan Lind, *The Discovery Survey*, *Law & Contemp. Probs.*, Autumn 1988, at 41.

by other means. A survey is presented by a survey expert who testifies about the responses of a substantial number of individuals who have been selected according to an explicit sampling plan and asked the same set of questions by interviewers who were not told who sponsored the survey or what answers were predicted or preferred. Although parties presumably are not obliged to present a survey conducted in anticipation of litigation by a nontestifying expert if it produced unfavorable results,<sup>28</sup> the court can and should scrutinize the method of respondent selection for any survey that is presented.

A party using a nonsurvey method generally identifies several witnesses who testify about their own characteristics, experiences, or impressions. While the party has no obligation to select these witnesses in any particular way or to report on how they were chosen, the party is not likely to select witnesses whose attributes conflict with the party's interests. The witnesses who testify are aware of the parties involved in the case and have discussed the case before testifying.

Although surveys are not the only means of demonstrating particular facts, presenting the results of a well-done survey through the testimony of an expert is an efficient way to inform the trier of fact about a large and representative group of potential witnesses. In some cases, courts have described surveys as the most direct form of evidence that can be offered.<sup>29</sup> Indeed, several courts have drawn negative inferences from the absence of a survey, taking the position that failure to undertake a survey may strongly suggest that a properly done survey would not support the plaintiff's position.<sup>30</sup>

## II. Purpose and Design of the Survey

### *A. Was the Survey Designed to Address Relevant Questions?*

The report describing the results of a survey should include a statement describing the purpose or purposes of the survey. One indication that a survey offers probative evidence is that it was designed to collect information relevant to the legal controversy (e.g., to estimate damages in an antitrust suit or to assess con-

28. *Loctite Corp. v. National Starch & Chem. Corp.*, 516 F. Supp. 190, 205 (S.D.N.Y. 1981) (distinguishing between surveys conducted in anticipation of litigation and surveys conducted for nonlitigation purposes which cannot be reproduced because of the passage of time, concluding that parties should not be compelled to introduce the former at trial, but may be required to provide the latter).

29. *E.g.*, *Charles Jacquin et Cie, Inc. v. Destileria Serralles, Inc.*, 921 F.2d 467, 475 (3d Cir. 1990). *See also* *Brunswick Corp. v. Spinit Reel Co.*, 832 F.2d 513, 522 (10th Cir. 1987).

30. *E.S. Originals, Inc. v. Stride Rite Corp.*, 656 F. Supp. 484, 490 (S.D.N.Y. 1987); *see also* *Ortho Pharm. Corp. v. Cosprophar, Inc.*, 32 F.3d 690, 695 (2d Cir. 1994); *Henri's Food Prods. Co. v. Kraft, Inc.*, 717 F.2d 352, 357 (7th Cir. 1983); *Information Clearing House, Inc. v. Find Magazine*, 492 F. Supp. 147, 160 (S.D.N.Y. 1980).

sumer confusion in a trademark case). Surveys not conducted specifically in preparation for, or in response to, litigation may provide important information,<sup>31</sup> but they frequently ask irrelevant questions<sup>32</sup> or select inappropriate samples of respondents for study.<sup>33</sup> Nonetheless, surveys do not always achieve their stated goals. Thus, the content and execution of a survey must be scrutinized even if the survey was designed to provide relevant data on the issue before the court. Moreover, if a survey was not designed for purposes of litigation, one source of bias is less likely: The party presenting the survey is less likely to have designed and constructed the survey to prove its side of the issue in controversy.

*B. Was Participation in the Design, Administration, and Interpretation of the Survey Appropriately Controlled to Ensure the Objectivity of the Survey?*

An early handbook for judges recommended that survey interviews be “conducted independently of the attorneys in the case.”<sup>34</sup> Some courts have interpreted this to mean that any evidence of attorney participation is objectionable.<sup>35</sup> A better interpretation is that the attorney should have no part in carrying out the survey.<sup>36</sup> However, some attorney involvement in the survey design is

31. See, e.g., *Wright v. Jeep Corp.*, 547 F. Supp. 871, 874 (E.D. Mich. 1982). Indeed, as courts increasingly have been faced with scientific issues, parties have requested in a number of recent cases that the courts compel production of research data and testimony by unretained experts. The circumstances under which an unretained expert can be compelled to testify or to disclose research data and opinions, as well as the extent of disclosure that can be required when the research conducted by the expert has a bearing on the issues in the case, are the subject of considerable current debate. See, e.g., Richard L. Marcus, *Discovery Along the Litigation/Science Interface*, 57 Brook. L. Rev. 381, 393–428 (1991); Joe S. Cecil, *Judicially Compelled Disclosure of Research Data*, 1 Cts. Health Sci. & L. 434 (1991); see also Symposium, *Court-Ordered Disclosure of Academic Research: A Clash of Values of Science and Law*, Law & Contemp. Probs., Summer 1996, at 1.

32. *Loctite Corp. v. National Starch & Chem. Corp.*, 516 F. Supp. 190, 206 (S.D.N.Y. 1981) (marketing surveys conducted before litigation were designed to test for brand awareness, whereas the “single issue at hand . . . [was] whether consumers understood the term ‘Super Glue’ to designate glue from a single source”).

33. In *Craig v. Boren*, 429 U.S. 190 (1976), the state unsuccessfully attempted to use its annual roadside survey of the blood alcohol level, drinking habits, and preferences of drivers to justify prohibiting the sale of 3.2% beer to males under the age of 21 and to females under the age of 18. The data were biased because it was likely that the male would be driving if both the male and female occupants of the car had been drinking. As pointed out in 2 Joseph L. Gastwirth, *Statistical Reasoning in Law and Public Policy: Tort Law, Evidence, and Health* 527 (1988), the roadside survey would have provided more relevant data if all occupants of the cars had been included in the survey (and if the type and amount of alcohol most recently consumed had been requested so that the consumption of 3.2% beer could have been isolated).

34. Judicial Conference of the U.S., *Handbook of Recommended Procedures for the Trial of Protracted Cases* 75 (1960).

35. E.g., *Boehringer Ingelheim G.m.b.H. v. Pharmadyne Lab.*, 532 F. Supp. 1040, 1058 (D.N.J. 1980).

36. *Upjohn Co. v. American Home Prods. Corp.*, No. 1-95-CV-237, 1996 U.S. Dist. LEXIS 8049, at \*42 (W.D. Mich. Apr. 5, 1996) (objection that “counsel reviewed the design of the survey

necessary to ensure that relevant questions are directed to a relevant population.<sup>37</sup> The trier of fact evaluates the objectivity and relevance of the questions on the survey and the appropriateness of the definition of the population used to guide sample selection. These aspects of the survey are visible to the trier of fact and can be judged on their quality, irrespective of who suggested them. In contrast, the interviews themselves are not directly visible, and any potential bias is minimized by having interviewers and respondents blind to the purpose and sponsorship of the survey and by excluding attorneys from any part in conducting interviews and tabulating results.

*C. Are the Experts Who Designed, Conducted, or Analyzed the Survey Appropriately Skilled and Experienced?*

Experts prepared to design, conduct, and analyze a survey generally should have graduate training in psychology (especially social, cognitive, or consumer psychology), sociology, marketing, communication sciences, statistics, or a related discipline; that training should include courses in survey research methods, sampling, measurement, interviewing, and statistics. In some cases, professional experience in conducting and publishing survey research may provide the requisite background. In all cases, the expert must demonstrate an understanding of survey methodology, including sampling,<sup>38</sup> instrument design (questionnaire and interview construction), and statistical analysis.<sup>39</sup> Publication in peer-reviewed journals, authored books, membership in professional organizations, faculty appointments, consulting experience, research grants, and membership on scientific advisory panels for government agencies or private foundations are indications of a professional's area and level of expertise. In addition, if the survey involves highly technical subject matter (e.g., the particular preferences of electrical engineers for various pieces of electrical equipment and the bases for those preferences) or involves a special population (e.g., developmentally disabled adults with limited cognitive skills), the survey expert also should be able to demonstrate sufficient familiarity with the topic or population (or assistance from an individual on the research team with suitable expertise) to design a survey instrument that will communicate clearly with relevant respondents.

carries little force with this Court because [opposing party] has not identified any flaw in the survey that might be attributed to counsel's assistance").

37. 3 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 32:166 (4th ed. 1996).

38. The one exception is that sampling expertise is unnecessary if the survey is administered to all members of the relevant population. See, e.g., *McGovern & Lind*, *supra* note 27.

39. If survey expertise is being provided by several experts, a single expert may have general familiarity but not special expertise in all these areas.

*D. Are the Experts Who Will Testify About Surveys Conducted by Others Appropriately Skilled and Experienced?*

Parties often call on an expert to testify about a survey conducted by someone else. The secondary expert's role is to offer support for a survey commissioned by the party who calls the expert, to critique a survey presented by the opposing party, or to introduce findings or conclusions from a survey not conducted in preparation for litigation or by any of the parties to the litigation. The trial court should take into account the exact issue that the expert seeks to testify about and the nature of the expert's field of expertise.<sup>40</sup> The secondary expert who gives an opinion about the adequacy and interpretation of a survey not only should have general skills and experience with surveys and be familiar with all of the issues addressed in this reference guide, but also should demonstrate familiarity with the following properties of the survey being discussed:

1. the purpose of the survey;
2. the survey methodology, including
  - a. the target population,
  - b. the sampling design used in conducting the survey,
  - c. the survey instrument (questionnaire or interview schedule), and
  - d. (for interview surveys) interviewer training and instruction;
3. the results, including rates and patterns of missing data; and
4. the statistical analyses used to interpret the results.

### III. Population Definition and Sampling

*A. Was an Appropriate Universe or Population Identified?*

One of the first steps in designing a survey or in deciding whether an existing survey is relevant is to identify the target population (or universe).<sup>41</sup> The target population consists of all elements (i.e., objects, individuals, or other social units) whose characteristics or perceptions the survey is intended to represent. Thus, in trademark litigation, the relevant population in some disputes may include all prospective and actual purchasers of the plaintiff's goods or services and all prospective and actual purchasers of the defendant's goods or services. Similarly, the population for a discovery survey may include all potential plaintiffs or all em-

40. Margaret A. Berger, *The Supreme Court's Trilogy on the Admissibility of Expert Testimony* § IV.C, in this manual.

41. Identification of the proper universe is recognized uniformly as a key element in the development of a survey. See, e.g., Judicial Conference of the U.S., *supra* note 34; MCL 3d, *supra* note 15, § 21.493. See also 3 McCarthy, *supra* note 37, § 32:166; Council of Am. Survey Res. Orgs., *Code of Standards and Ethics for Survey Research* § III.B.4 (1997).

employees who worked for Company A between two specific dates. In a community survey designed to provide evidence for a motion for a change of venue, the relevant population consists of all jury-eligible citizens in the community in which the trial is to take place.<sup>42</sup> The definition of the relevant population is crucial because there may be systematic differences in the responses of members of the population and nonmembers. (For example, consumers who are prospective purchasers may know more about the product category than consumers who are not considering making a purchase.)

The universe must be defined carefully. For example, a commercial for a toy or breakfast cereal may be aimed at children, who in turn influence their parents' purchases. If a survey assessing the commercial's tendency to mislead were conducted based on the universe of prospective and actual adult purchasers, it would exclude a crucial group of eligible respondents. Thus, the appropriate population in this instance would include children as well as parents.<sup>43</sup>

### *B. Did the Sampling Frame Approximate the Population?*

The target population consists of all the individuals or units that the researcher would like to study. The sampling frame is the source (or sources) from which the sample actually is drawn. The surveyor's job generally is easier if a complete list of every eligible member of the population is available (e.g., all plaintiffs in a discovery survey), so that the sampling frame lists the identity of all members of the target population. Frequently, however, the target population includes members who are inaccessible or who cannot be identified in advance. As a result, compromises are sometimes required in developing the sampling frame. The survey report should contain a description of the target population, a description of the survey population actually sampled, a discussion of the difference between the two populations, and an evaluation of the likely consequences of that difference.

42. A second relevant population may consist of jury-eligible citizens in the community where the party would like to see the trial moved. By questioning citizens in both communities, the survey can test whether moving the trial is likely to reduce the level of animosity toward the party requesting the change of venue. See *United States v. Haldeman*, 559 F.2d 31, 140, 151, app. A at 176-79 (D.C. Cir. 1976) (court denied change of venue over the strong objection of Judge MacKinnon, who cited survey evidence that Washington, D.C., residents were substantially more likely to conclude, before trial, that the defendants were guilty), *cert. denied*, 431 U.S. 933 (1977); see also *People v. Venegas*, 31 Cal. Rptr. 2d 114, 117 (Ct. App. 1994) (change of venue denied because defendant failed to show that the defendant would face a less hostile jury in a different court).

43. Children and some other populations create special challenges for researchers. For example, very young children should not be asked about sponsorship or licensing, concepts that are foreign to them. Concepts, as well as wording, should be age-appropriate.



A survey that provides information about a wholly irrelevant universe of respondents is itself irrelevant.<sup>44</sup> Courts are likely to exclude the survey or accord it little weight. Thus, when the plaintiff submitted the results of a survey to prove that the green color of its fishing rod had acquired a secondary meaning, the court gave the survey little weight in part because the survey solicited the views of fishing rod dealers rather than consumers.<sup>45</sup> More commonly, however, the sampling frame is either underinclusive or overinclusive relative to the target population. If it is underinclusive, the survey's value depends on the extent to which the excluded population is likely to react differently from the included population. Thus, a survey of spectators and participants at running events would be sampling a sophisticated subset of those likely to purchase running shoes. Because this subset probably would consist of the consumers most knowledgeable about the trade dress used by companies that sell running shoes, a survey based on this population would be likely to substantially overrepresent the strength of a particular design as a trademark, and the extent of that overrepresentation would be unknown and not susceptible to any reasonable estimation.<sup>46</sup>

Similarly, in a survey designed to project demand for cellular phones, the assumption that businesses would be the primary users of cellular service led surveyors to exclude potential nonbusiness users from the survey. The Federal Communications Commission (FCC) found the assumption unwarranted and concluded that the research was flawed, in part because of this underinclusive universe.<sup>47</sup>

44. A survey aimed at assessing how persons in the trade respond to an advertisement should be conducted on a sample of persons in the trade and not on a sample of consumers. *Home Box Office v. Showtime/The Movie Channel*, 665 F. Supp. 1079, 1083 (S.D.N.Y.), *aff'd in part & vacated in part*, 832 F.2d 1311 (2d Cir. 1987). *But see* *Lon Tai Shing Co. v. Koch + Lowy*, No. 90-C4464, 1990 U.S. Dist. LEXIS 19123, at \*50 (S.D.N.Y. Dec. 14, 1990), in which the judge was willing to find likelihood of consumer confusion from a survey of lighting store salespersons questioned by a survey researcher posing as a customer. The court was persuaded that the salespersons who were misstating the source of the lamp, whether consciously or not, must have believed reasonably that the consuming public would be misled by the salespersons' inaccurate statements about the name of the company that manufactured the lamp they were selling.

45. *R.L. Winston Rod Co. v. Sage Mfg. Co.*, 838 F. Supp. 1396, 1401-02 (D. Mont. 1993).

46. *Brooks Shoe Mfg. Co. v. Suave Shoe Corp.*, 533 F. Supp. 75, 80 (S.D. Fla. 1981), *aff'd*, 716 F.2d 854 (11th Cir. 1983). *See also* *Winning Ways, Inc. v. Holloway Sportswear, Inc.*, 913 F. Supp. 1454, 1467 (D. Kan. 1996) (survey flawed in failing to include sporting goods customers who constituted a major portion of customers). *But see* *Thomas & Betts Corp. v. Panduit Corp.*, 138 F.3d 277, 294-95 (7th Cir. 1998) (survey of store personnel admissible because relevant market included both distributors and ultimate purchasers).

47. *Gencom, Inc.*, 56 Rad. Reg. 2d (P&F) 1597, 1604 (1984). This position was affirmed on appeal. *See Gencom, Inc. v. FCC*, 832 F.2d 171, 186 (D.C. Cir. 1987).

In some cases, it is difficult to determine whether an underinclusive universe distorts the results of the survey and, if so, the extent and likely direction of the bias. For example, a trademark survey was designed to test the likelihood of confusing an analgesic currently on the market with a new product that was similar in appearance.<sup>48</sup> The plaintiff's survey included only respondents who had used the plaintiff's analgesic, and the court found that the universe should have included users of other analgesics, "so that the full range of potential customers for whom plaintiff and defendants would compete could be studied."<sup>49</sup> In this instance, it is unclear whether users of the plaintiff's product would be more or less likely to be confused than users of the defendant's product or users of a third analgesic.<sup>50</sup>

An overinclusive universe generally presents less of a problem in interpretation than does an underinclusive universe. If the survey expert can demonstrate that a sufficiently large (and representative) subset of respondents in the survey was drawn from the appropriate universe, the responses obtained from that subset can be examined, and inferences about the relevant universe can be drawn based on that subset.<sup>51</sup> If the relevant subset cannot be identified, however, an overbroad universe will reduce the value of the survey.<sup>52</sup> If the sample is drawn from an underinclusive universe, there is generally no way to know how the unrepresented members would have responded.<sup>53</sup>

### *C. How Was the Sample Selected to Approximate the Relevant Characteristics of the Population?*

Identification of a survey population must be followed by selection of a sample that accurately represents that population.<sup>54</sup> The use of probability sampling techniques maximizes both the representativeness of the survey results and the ability to assess the accuracy of estimates obtained from the survey.

Probability samples range from simple random samples to complex multi-stage sampling designs that use stratification, clustering of population elements into various groupings, or both. In simple random sampling, the most basic type

48. *American Home Prods. Corp. v. Barr Lab., Inc.*, 656 F. Supp. 1058 (D.N.J.), *aff'd*, 834 F.2d 368 (3d Cir. 1987).

49. *Id.* at 1070.

50. See also *Craig v. Boren*, 429 U.S. 190 (1976).

51. This occurred in *National Football League Properties, Inc. v. Wichita Falls Sportswear, Inc.*, 532 F. Supp. 651, 657–58 (W.D. Wash. 1982).

52. *Schieffelin & Co. v. Jack Co. of Boca*, 850 F. Supp. 232, 246 (S.D.N.Y. 1994).

53. See, e.g., *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 263–64 (5th Cir.) (court found both plaintiff's and defendant's surveys substantially defective for a systematic failure to include parts of the relevant population), *cert. denied*, 449 U.S. 899 (1980).

54. MCL 3d, *supra* note 15, § 21.493. See also David H. Kaye & David A. Freedman, Reference Guide on Statistics § II.B, in this manual.

of probability sampling, every element in the population has a known, equal probability of being included in the sample, and all possible samples of a given size are equally likely to be selected.<sup>55</sup> In all forms of probability sampling, each element in the relevant population has a known, nonzero probability of being included in the sample.<sup>56</sup>

Probability sampling offers two important advantages over other types of sampling. First, the sample can provide an unbiased estimate of the responses of all persons in the population from which the sample was drawn; that is, the expected value of the sample estimate is the population value being estimated. Second, the researcher can calculate a confidence interval that describes explicitly how reliable the sample estimate of the population is likely to be. Thus, suppose a survey tested a sample of 400 dentists randomly selected from the population of all dentists licensed to practice in the United States and found that 80, or 20%, of them mistakenly believed that a new toothpaste, Goldgate, was manufactured by the makers of Colgate. A survey expert could properly compute a confidence interval around the 20% estimate obtained from this sample. If the survey was repeated a large number of times, and a 95% confidence interval was computed each time, 95% of the confidence intervals would include the actual percentage of dentists in the entire population who would believe that Goldgate was manufactured by the makers of Colgate.<sup>57</sup> In this example, the confidence interval, or margin of error, is the estimate (20%) plus or minus 4%, or the distance between 16% and 24%.

All sample surveys produce estimates of population values, not exact measures of those values. Strictly speaking, the margin of sampling error associated with the sample estimate assumes probability sampling. Assuming a probability sample, a confidence interval describes how stable the mean response in the sample is likely to be. The width of the confidence interval depends on three characteristics:

55. Systematic sampling, in which every  $n$ th unit in the population is sampled and the starting point is selected randomly, fulfills the first of these conditions. It does not fulfill the second, because no systematic sample can include elements adjacent to one another on the list of population members from which the sample is drawn. Except in very unusual situations when periodicities occur, systematic samples and simple random samples generally produce the same results. Seymour Sudman, *Applied Sampling*, in *Handbook of Survey Research*, *supra* note 1, at 145, 169.

56. Other probability sampling techniques include (1) stratified random sampling, in which the researcher subdivides the population into mutually exclusive and exhaustive subpopulations, or strata, and then randomly selects samples from within these strata; and (2) cluster sampling, in which elements are sampled in groups or clusters, rather than on an individual basis. Martin Frankel, *Sampling Theory*, in *Handbook of Survey Research*, *supra* note 1, at 21, 37, 47.

57. Actually, since survey interviewers would be unable to locate some dentists and some dentists would be unwilling to participate in the survey, technically the population to which this sample would be projectable would be all dentists with current addresses who would be willing to participate in the survey if they were asked.

1. the size of the sample (the larger the sample, the narrower the interval);
2. the variability of the response being measured; and
3. the confidence level the researcher wants to have.

Traditionally, scientists adopt the 95% level of confidence, which means that if 100 samples of the same size were drawn, the confidence interval expected for at least 95 of the samples would be expected to include the true population value.<sup>58</sup>

Although probability sample surveys often are conducted in organizational settings and are the recommended sampling approach in academic and government publications on surveys, probability sample surveys can be expensive when in-person interviews are required, the target population is dispersed widely, or qualified respondents are scarce. A majority of the consumer surveys conducted for Lanham Act litigation present results from nonprobability convenience samples.<sup>59</sup> They are admitted into evidence based on the argument that nonprobability sampling is used widely in marketing research and that “results of these studies are used by major American companies in making decisions of considerable consequence.”<sup>60</sup> Nonetheless, when respondents are not selected randomly from the relevant population, the expert should be prepared to justify the method used to select respondents. Special precautions are required to reduce the likelihood of biased samples.<sup>61</sup> In addition, quantitative values computed from such samples (e.g., percentage of respondents indicating confusion) should be viewed as rough indicators rather than as precise quantitative estimates. Confidence intervals should not be computed.

58. To increase the likelihood that the confidence interval contains the actual population value (e.g., from 95% to 99%), the width of the confidence interval can be expanded. An increase in the confidence interval brings an increase in the confidence level. For further discussion of confidence intervals, see David H. Kaye & David A. Freedman, Reference Guide on Statistics § IV.A, in this manual.

59. Jacob Jacoby & Amy H. Handlin, *Non-Probability Sampling Designs for Litigation Surveys*, 81 Trademark Rep. 169, 173 (1991). For probability surveys conducted in trademark cases, see *National Football League Properties, Inc. v. Wichita Falls Sportswear, Inc.*, 532 F. Supp. 651 (W.D. Wash. 1982); *James Burrough, Ltd. v. Sign of Beefeater, Inc.*, 540 F.2d 266 (7th Cir. 1976).

60. *National Football League Properties, Inc. v. New Jersey Giants, Inc.*, 637 F. Supp. 507, 515 (D.N.J. 1986). A survey of members of the Council of American Survey Research Organizations, the national trade association for commercial survey research firms in the United States, revealed that 95% of the in-person independent contacts in studies done in 1985 took place in malls or shopping centers. Jacoby & Handlin, *supra* note 59, at 172–73, 176.

*D. Was the Level of Nonresponse Sufficient to Raise Questions About the Representativeness of the Sample? If So, What Is the Evidence That Nonresponse Did Not Bias the Results of the Survey?*

Even when a sample is drawn randomly from a complete list of elements in the target population, responses or measures may be obtained on only part of the selected sample. If this lack of response were distributed randomly, valid inferences about the population could be drawn from the characteristics of the available elements in the sample. The difficulty is that nonresponse often is not random, so that, for example, persons who are single typically have three times the “not at home” rate in U.S. Census Bureau surveys as do family members.<sup>62</sup> Efforts to increase response rates include making several attempts to contact potential respondents and providing financial incentives for participating in the survey.

One suggested formula for quantifying a tolerable level of nonresponse in a probability sample is based on the guidelines for statistical surveys issued by the former U.S. Office of Statistical Standards.<sup>63</sup> According to these guidelines, response rates of 90% or more are reliable and generally can be treated as random samples of the overall population. Response rates between 75% and 90% usually yield reliable results, but the researcher should conduct some check on the representativeness of the sample. Potential bias should receive greater scrutiny when the response rate drops below 75%. If the response rate drops below 50%, the survey should be regarded with significant caution as a basis for precise quantitative statements about the population from which the sample was drawn.<sup>64</sup>

Determining whether the level of nonresponse in a survey is critical generally requires an analysis of the determinants of nonresponse. For example, even a survey with a high response rate may seriously underrepresent some portions of the population, such as the unemployed or the poor. If a general population sample was used to chart changes in the proportion of the population that knows someone with HIV, the survey would underestimate the population value if some groups more likely to know someone with HIV (e.g., intravenous drug users) were underrepresented in the sample. The survey expert should be prepared to provide evidence on the potential impact of nonresponse on the survey results.

61. See *infra* § III.E.

62. 2 Gastwirth, *supra* note 33, at 501. This volume contains a useful discussion of sampling, along with a set of examples. *Id.* at 467.

63. This standard is cited with approval by Gastwirth. *Id.* at 502.

64. For thoughtful examples of judges closely scrutinizing potential sample bias when response rates were below 75%, see *Vuyanich v. Republic National Bank*, 505 F. Supp. 224 (N.D. Tex. 1980); *Rosado v. Wyman*, 322 F. Supp. 1173 (E.D.N.Y.), *aff'd*, 437 F.2d 619 (2d Cir. 1970), *aff'd*, 402 U.S. 991 (1971).

In surveys that include sensitive or difficult questions, particularly surveys that are self-administered, some respondents may refuse to provide answers or may provide incomplete answers. To assess the impact of nonresponse to a particular question, the survey expert should analyze the differences between those who answered and those who did not answer. Procedures to address the problem of missing data include recontacting respondents to obtain the missing answers and using the respondent's other answers to predict the missing response.<sup>65</sup>

### *E. What Procedures Were Used to Reduce the Likelihood of a Biased Sample?*

If it is impractical for a survey researcher to sample randomly from the entire target population, the researcher still can apply probability sampling to some aspects of respondent selection to reduce the likelihood of biased selection. For example, in many studies the target population consists of all consumers or purchasers of a product. Because it is impractical to randomly sample from that population, research is conducted in shopping malls where some members of the target population may not shop. Mall locations, however, can be sampled randomly from a list of possible mall sites. By administering the survey at several different malls, the expert can test for and report on any differences observed across sites. To the extent that similar results are obtained in different locations using different on-site interview operations, it is less likely that idiosyncrasies of sample selection or administration can account for the results.<sup>66</sup> Similarly, since the characteristics of persons visiting a shopping center vary by day of the week and time of day, bias in sampling can be reduced if the survey design calls for sampling time segments as well as mall locations.<sup>67</sup>

In mall intercept surveys, the organization that manages the on-site interview facility generally employs recruiters who approach potential survey respondents in the mall and ascertain if they are qualified and willing to participate in the survey. If a potential respondent agrees to answer the questions and meets the specified criteria, he or she is escorted to the facility where the survey interview takes place. If recruiters are free to approach potential respondents without controls on how an individual is to be selected for screening, shoppers who spend more time in the mall are more likely to be approached than shoppers who visit the mall only briefly. Moreover, recruiters naturally prefer to approach friendly-

65. Andy B. Anderson et al., *Missing Data: A Review of the Literature*, in *Handbook of Survey Research*, *supra* note 1, at 415.

66. Note, however, that differences in results across sites may be due to genuine differences in respondents across geographic locations or to a failure to administer the survey consistently across sites.

67. Seymour Sudman, *Improving the Quality of Shopping Center Sampling*, 17 J. Marketing Res. 423 (1980).

looking potential respondents, so that it is more likely that certain types of individuals will be selected. These potential biases in selection can be reduced by providing appropriate selection instructions and training recruiters effectively. Training that reduces the interviewer's discretion in selecting a potential respondent is likely to reduce bias in selection, as are instructions to approach every *n*th person entering the facility through a particular door.<sup>68</sup>

#### *F. What Precautions Were Taken to Ensure That Only Qualified Respondents Were Included in the Survey?*

In a carefully executed survey, each potential respondent is questioned or measured on the attributes that determine his or her eligibility to participate in the survey. Thus, the initial questions screen potential respondents to determine if they are within the target population of the survey (e.g., Is she at least fourteen years old? Does she own a dog? Does she live within ten miles?). The screening questions must be drafted so that they do not convey information that will influence the respondent's answers on the main survey. For example, if respondents must be prospective and recent purchasers of Sunshine orange juice in a trademark survey designed to assess consumer confusion with Sun Time orange juice, potential respondents might be asked to name the brands of orange juice they have purchased recently or expect to purchase in the next six months. They should not be asked specifically if they recently have purchased, or expect to purchase, Sunshine orange juice, because this may affect their responses on the survey either by implying who is conducting the survey or by supplying them with a brand name that otherwise would not occur to them.

The content of a screening questionnaire (or screener) can also set the context for the questions that follow. In *Pfizer, Inc. v. Astra Pharmaceutical Products, Inc.*,<sup>69</sup> physicians were asked a screening question to determine whether they prescribed particular drugs. The court found that the screener conditioned the physicians to respond with the name of a drug rather than a condition.<sup>70</sup>

The criteria for determining whether to include a potential respondent in the survey should be objective and clearly conveyed, preferably using written instructions addressed to those who administer the screening questions. These instructions and the completed screening questionnaire should be made avail-

68. In the end, even if malls are randomly sampled and shoppers are randomly selected within malls, results from mall surveys technically can be used to generalize only to the population of mall shoppers. The ability of the mall sample to describe the likely response pattern of the broader relevant population will depend on the extent to which a substantial segment of the relevant population (1) is not found in malls and (2) would respond differently to the interview.

69. 858 F. Supp. 1305, 1321 & n.13 (S.D.N.Y. 1994).

70. *Id.* at 1321.

able to the court and the opposing party along with the interview form for each respondent.

## IV. Survey Questions and Structure

### *A. Were Questions on the Survey Framed to Be Clear, Precise, and Unbiased?*

Although it seems obvious that questions on a survey should be clear and precise, phrasing questions to reach that goal is often difficult. Even questions that appear clear can convey unexpected meanings and ambiguities to potential respondents. For example, the question “What is the average number of days each week you have butter?” appears to be straightforward. Yet some respondents wondered whether margarine counted as butter, and when the question was revised to include the introductory phrase “not including margarine,” the reported frequency of butter use dropped dramatically.<sup>71</sup>

When unclear questions are included in a survey, they may threaten the validity of the survey by systematically distorting responses if respondents are misled in a particular direction, or by inflating random error if respondents guess because they do not understand the question.<sup>72</sup> If the crucial question is sufficiently ambiguous or unclear, it may be the basis for rejecting the survey. For example, a survey was designed to assess community sentiment that would warrant a change of venue in trying a case for damages sustained when a hotel skywalk collapsed.<sup>73</sup> The court found that the question “Based on what you have heard, read or seen, do you believe that in the current compensatory damage trials, the defendants, such as the contractors, designers, owners, and operators of the Hyatt Hotel, should be punished?” could neither be correctly understood nor easily answered.<sup>74</sup> The court noted that the phrase “compensatory damages,” although well-defined for attorneys, was unlikely to be meaningful for laypersons.<sup>75</sup>

Texts on survey research generally recommend pretests as a way to increase the likelihood that questions are clear and unambiguous,<sup>76</sup> and some courts have

71. Floyd J. Fowler, Jr., *How Unclear Terms Affect Survey Data*, 56 Pub. Opinion Q. 218, 225–26 (1992).

72. *Id.* at 219.

73. *Firestone v. Crown Ctr. Redevelopment Corp.*, 693 S.W.2d 99 (Mo. 1985) (en banc).

74. *Id.* at 102, 103.

75. *Id.* at 103. When there is any question about whether some respondent will understand a particular term or phrase, the term or phrase should be defined explicitly.

76. For a thorough treatment of pretesting methods, see Jean M. Converse & Stanley Presser, *Survey Questions: Handcrafting the Standardized Questionnaire* 51 (1986). See also Fred W. Morgan, *Judicial Standards for Survey Research: An Update and Guidelines*, 54 J. Marketing 59, 64 (1990).



recognized the value of pretests.<sup>77</sup> In a pretest or pilot test,<sup>78</sup> the proposed survey is administered to a small sample (usually between twenty-five and seventy-five)<sup>79</sup> of the same type of respondents who would be eligible to participate in the full-scale survey. The interviewers observe the respondents for any difficulties they may have with the questions and probe for the source of any such difficulties so that the questions can be rephrased if confusion or other difficulties arise. Attorneys who commission surveys for litigation sometimes are reluctant to approve pilot work or to reveal that pilot work has taken place because they are concerned that if a pretest leads to revised wording of the questions, the trier of fact may believe that the survey has been manipulated and is biased or unfair. A more appropriate reaction is to recognize that pilot work can improve the quality of a survey and to anticipate that it often results in word changes that increase clarity and correct misunderstandings. Thus, changes may indicate informed survey construction rather than flawed survey design.<sup>80</sup>

### *B. Were Filter Questions Provided to Reduce Guessing?*

Some survey respondents may have no opinion on an issue under investigation, either because they have never thought about it before or because the question mistakenly assumes a familiarity with the issue. For example, survey respondents may not have noticed that the commercial they are being questioned about guaranteed the quality of the product being advertised and thus they may have no opinion on the kind of guarantee it indicated. Likewise, in an employee survey, respondents may not be familiar with the parental leave policy at their company and thus may have no opinion on whether they would consider taking advantage of the parental leave policy if they became parents. The following three alternative question structures will affect how those respondents answer and how their responses are counted.

First, the survey can ask all respondents to answer the question (e.g., “Did you understand the guarantee offered by Clover to be a one-year guarantee, a sixty-day guarantee, or a thirty-day guarantee?”). Faced with a direct question, particularly one that provides response alternatives, the respondent obligingly may supply an answer even if (in this example) the respondent did not notice the guarantee (or is unfamiliar with the parental leave policy). Such answers will

77. E.g., *Zippo Mfg. Co. v. Rogers Imports, Inc.*, 216 F. Supp. 670 (S.D.N.Y. 1963).

78. The terms *pretest* and *pilot test* are sometimes used interchangeably to describe pilot work done in the planning stages of research. When they are distinguished, the difference is that a pretest tests the questionnaire, whereas a pilot test generally tests proposed collection procedures as well.

79. Converse & Presser, *supra* note 76, at 69. Converse and Presser suggest that a pretest with twenty-five respondents is appropriate when the survey uses professional interviewers.

80. See *infra* § VII.B for a discussion of obligations to disclose pilot work.

reflect only what the respondent can glean from the question, or they may reflect pure guessing. The imprecision introduced by this approach will increase with the proportion of respondents who are unfamiliar with the topic at issue.

Second, the survey can use a quasi-filter question to reduce guessing by providing “don’t know” or “no opinion” options as part of the question (e.g., “Did you understand the guarantee offered by Clover to be for more than a year, a year, or less than a year, or don’t you have an opinion?”).<sup>81</sup> By signaling to the respondent that it is appropriate not to have an opinion, the question reduces the demand for an answer and, as a result, the inclination to hazard a guess just to comply. Respondents are more likely to choose a “no opinion” option if it is mentioned explicitly by the interviewer than if it is merely accepted when the respondent spontaneously offers it as a response. The consequence of this change in format is substantial. Studies indicate that, although the relative distribution of the respondents selecting the *listed* choices is unlikely to change dramatically, presentation of an explicit “don’t know” or “no opinion” alternative commonly leads to a 20%–25% increase in the proportion of respondents selecting that response.<sup>82</sup>

Finally, the survey can include full-filter questions, that is, questions that lay the groundwork for the substantive question by first asking the respondent if he or she has an opinion about the issue or happened to notice the feature that the interviewer is preparing to ask about (e.g., “Based on the commercial you just saw, do you have an opinion about how long Clover stated or implied that its guarantee lasts?”). The interviewer then asks the substantive question only of those respondents who have indicated that they have an opinion on the issue.

Which of these three approaches is used and the way it is used can affect the rate of “no opinion” responses that the substantive question will evoke.<sup>83</sup> Respondents are more likely to say they do not have an opinion on an issue if a full filter is used than if a quasi-filter is used.<sup>84</sup> However, in maximizing respondent expressions of “no opinion,” full filters may produce an underreporting of opinions. There is some evidence that full-filter questions discourage respondents who actually have opinions from offering them by conveying the implicit suggestion that respondents can avoid difficult follow-up questions by saying that they have no opinion.<sup>85</sup>

81. Norbert Schwarz & Hans-Jürgen Hippler, *Response Alternatives: The Impact of Their Choice and Presentation Order*, in *Measurement Errors in Surveys* 41, 45–46 (Paul P. Biemer et al. eds., 1991).

82. Howard Schuman & Stanley Presser, *Questions and Answers in Attitude Surveys: Experiments on Question Form, Wording and Context* 113–46 (1981).

83. Considerable research has been conducted on the effects of filters. For a review, see George F. Bishop et al., *Effects of Filter Questions in Public Opinion Surveys*, 47 *Pub. Opinion Q.* 528 (1983).

84. Schwarz & Hippler, *supra* note 81, at 45–46.

85. *Id.* at 46.

In general, then, a survey that uses full filters tends to provide a conservative estimate of the number of respondents holding an opinion, whereas a survey that uses neither full filters nor quasi-filters tends to overestimate the number of respondents with opinions, because some respondents offering opinions are guessing. The strategy of including a “no opinion” or “don’t know” response as a quasi-filter avoids both of these extremes. Thus, rather than asking, “Based on the commercial, do you believe that the two products are made in the same way, or are they made differently?”<sup>86</sup> or prefacing the question with a preliminary, “Do you have an opinion, based on the commercial, concerning the way that the two products are made?” the question could be phrased, “Based on the commercial, do you believe that the two products are made in the same way, or that they are made differently, or don’t you have an opinion about the way they are made?”

*C. Did the Survey Use Open-Ended or Closed-Ended Questions?  
How Was the Choice in Each Instance Justified?*

The questions that make up a survey instrument may be open-ended, closed-ended, or a combination of both. Open-ended questions require the respondent to formulate and express an answer in his or her own words (e.g., “What was the main point of the commercial?” “Where did you catch the fish you caught in these waters?”<sup>87</sup>). Closed-ended questions provide the respondent with an explicit set of responses from which to choose; the choices may be as simple as yes or no (e.g., “Is Colby College coeducational?”<sup>88</sup>) or as complex as a range of alternatives (e.g., “The two pain relievers have (1) the same likelihood of causing gastric ulcers; (2) about the same likelihood of causing gastric ulcers; (3) a somewhat different likelihood of causing gastric ulcers; (4) a very different likelihood of causing gastric ulcers; or (5) none of the above.”<sup>89</sup>).

Open-ended and closed-ended questions may elicit very different responses.<sup>90</sup>

86. The question in the example without the “no opinion” alternative was based on a question rejected by the court in *Coors Brewing Co. v. Anheuser-Busch Cos.*, 802 F. Supp. 965, 972–73 (S.D.N.Y. 1992).

87. A relevant example from *Wilhoite v. Olin Corp.* is described in McGovern & Lind, *supra* note 27, at 76.

88. *Presidents & Trustees of Colby College v. Colby College–N.H.*, 508 F.2d 804, 809 (1st Cir. 1975).

89. This question is based on one asked in *American Home Products Corp. v. Johnson & Johnson*, 654 F. Supp. 568, 581 (S.D.N.Y. 1987), that was found to be a leading question by the court, primarily because the choices suggested that the respondent had learned about aspirin’s and ibuprofen’s relative likelihood of causing gastric ulcers. In contrast, in *McNeilab, Inc. v. American Home Products Corp.*, 501 F. Supp. 517, 525 (S.D.N.Y. 1980), the court accepted as nonleading the question, “Based only on what the commercial said, would Maximum Strength Anacin contain more pain reliever, the same amount of pain reliever, or less pain reliever than the brand you, yourself, currently use most often?”

90. Howard Schuman & Stanley Presser, *Question Wording as an Independent Variable in Survey Analysis*,

Most responses are less likely to be volunteered by respondents who are asked an open-ended question than they are to be chosen by respondents who are presented with a closed-ended question. The response alternatives in a closed-ended question may remind respondents of options that they would not otherwise consider or which simply do not come to mind as easily.<sup>91</sup>

The advantage of open-ended questions is that they give the respondent fewer hints about the answer that is expected or preferred. Precoded responses on a closed-ended question, in addition to reminding respondents of options that they might not otherwise consider,<sup>92</sup> may direct the respondent away from or toward a particular response. For example, a commercial reported that in shampoo tests with more than 900 women, the sponsor's product received higher ratings than other brands.<sup>93</sup> According to a competitor, the commercial deceptively implied that each woman in the test rated more than one shampoo, when in fact each woman rated only one. To test consumer impressions, a survey might have shown the commercial and asked an open-ended question: "How many different brands mentioned in the commercial did each of the 900 women try?"<sup>94</sup> Instead, the survey asked a closed-ended question; respondents were given the choice of "one," "two," "three," "four," or "five or more." The fact that four of the five choices in the closed-ended question provided a response that was greater than one implied that the correct answer was probably more than one.<sup>95</sup> Note, however, that the open-ended question also may suggest that the answer is more than one. By asking "how many different brands," the question suggests (1) that the viewer should have received some message from the commercial about the number of brands each woman tried and (2) that different brands were tried. Thus, the wording of a question, open-ended or closed-ended, can be leading, and the degree of suggestiveness of each question must be considered in evaluating the objectivity of a survey.

6 Soc. Methods & Res. 151 (1977); Schuman & Presser, *supra* note 82, at 79–112; Converse & Presser, *supra* note 76, at 33.

91. For example, when respondents in one survey were asked, "What is the most important thing for children to learn to prepare them for life?", 62% picked "to think for themselves" from a list of five options, but only 5% spontaneously offered that answer when the question was open-ended. Schuman & Presser, *supra* note 82, at 104–07. An open-ended question presents the respondent with a free-recall task, whereas a closed-ended question is a recognition task. Recognition tasks in general reveal higher performance levels than recall tasks. Mary M. Smyth et al., *Cognition in Action* 25 (1987). In addition, there is evidence that respondents answering open-ended questions may be less likely to report some information that they would reveal in response to a closed-ended question when that information seems self-evident or irrelevant.

92. Schwarz & Hippler, *supra* note 81, at 43.

93. See *Vidal Sassoon, Inc. v. Bristol-Myers Co.*, 661 F.2d 272, 273 (2d Cir. 1981).

94. This was the wording of the stem of the closed-ended question in the survey discussed in *Vidal Sassoon*, 661 F.2d at 275–76.

95. Ninety-five percent of the respondents who answered the closed-ended question in the plaintiff's survey said that each woman had tried two or more brands. The open-ended question was never asked.

Closed-ended questions have some additional potential weaknesses that arise if the choices are not constructed properly. If the respondent is asked to choose one response from among several choices, the response chosen will be meaningful only if the list of choices is exhaustive, that is, if the choices cover all possible answers a respondent might give to the question. If the list of possible choices is incomplete, a respondent may be forced to choose one that does not express his or her opinion.<sup>96</sup> Moreover, if respondents are told explicitly that they are not limited to the choices presented, most respondents nevertheless will select an answer from among the listed ones.<sup>97</sup>

Although many courts prefer open-ended questions on the grounds that they tend to be less leading, the value of any open-ended or closed-ended question depends on the information it is intended to elicit. Open-ended questions are more appropriate when the survey is attempting to gauge what comes first to a respondent's mind, but closed-ended questions are more suitable for assessing choices between well-identified options or obtaining ratings on a clear set of alternatives.

*D. If Probes Were Used to Clarify Ambiguous or Incomplete Answers, What Steps Were Taken to Ensure That the Probes Were Not Leading and Were Administered in a Consistent Fashion?*

When questions allow respondents to express their opinions in their own words, some of the respondents may give ambiguous or incomplete answers. In such instances, interviewers may be instructed to record any answer that the respondent gives and move on to the next question, or they may be instructed to probe to obtain a more complete response or clarify the meaning of the ambiguous response. In either situation, interviewers should record verbatim both what the respondent says and what the interviewer says in the attempt to get clarification. Failure to record every part of the exchange in the order in which it occurs raises questions about the reliability of the survey, because neither the court nor the opposing party can evaluate whether the probe affected the views expressed by the respondent.

*Vidal Sassoon*, 661 F.2d at 276. Norbert Schwarz, *Assessing Frequency Reports of Mundane Behaviors: Contributions of Cognitive Psychology to Questionnaire Construction*, in *Research Methods in Personality and Social Psychology* 98 (Clyde Hendrick & Margaret S. Clark eds., 1990), suggests that respondents often rely on the range of response alternatives as a frame of reference when they are asked for frequency judgments. See, e.g., Roger Tourangeau & Tom W. Smith, *Asking Sensitive Questions: The Impact of Data Collection Mode, Question Format, and Question Context*, 60 Pub. Opinion Q. 275, 292 (1996).

96. See, e.g., *American Home Prods. Corp. v. Johnson & Johnson*, 654 F. Supp. 568, 581 (S.D.N.Y. 1987).

97. See Howard Schuman, *Ordinary Questions, Survey Questions, and Policy Questions*, 50 Pub. Opinion Q. 432, 435-36 (1986).

If the survey is designed to allow for probes, interviewers must be given explicit instructions on when they should probe and what they should say in probing. Standard probes used to draw out all that the respondent has to say (e.g., “Any further thoughts?” “Anything else?” “Can you explain that a little more?”) are relatively innocuous and noncontroversial in content, but persistent continued requests for further responses to the same or nearly identical questions may convey the idea to the respondent that he or she has not yet produced the “right” answer.<sup>98</sup> Interviewers should be trained in delivering probes to maintain a professional and neutral relationship with the respondent (as they should during the rest of the interview), which minimizes any sense of passing judgment on the content of the answers offered. Moreover, interviewers should be given explicit instructions on when to probe, so that probes are administered consistently.

A more difficult type of probe to construct and deliver reliably is one that requires a substantive question tailored to the answer given by the respondent. The survey designer must provide sufficient instruction to interviewers so that they avoid giving directive probes that suggest one answer over another. Those instructions, along with all other aspects of interviewer training, should be made available for evaluation by the court and the opposing party.

#### *E. What Approach Was Used to Avoid or Measure Potential Order or Context Effects?*

The order in which questions are asked on a survey and the order in which response alternatives are provided in a closed-ended question can influence the answers.<sup>99</sup> Thus, although asking a general question before a more specific question on the same topic is unlikely to affect the response to the specific question, reversing the order of the questions may influence responses to the general question. As a rule, then, surveys are less likely to be subject to order effects if

98. See, e.g., *Johnson & Johnson-Merck Consumer Pharms. Co. v. Rhone-Poulenc Rorer Pharms., Inc.*, 19 F.3d 125, 135 (3d Cir. 1994); *American Home Prods. Corp. v. Procter & Gamble Co.*, 871 F. Supp. 739, 748 (D.N.J. 1994).

99. See Schuman & Presser, *supra* note 82, at 23, 56–74; Norman M. Bradburn, *Response Effects*, in *Handbook of Survey Research*, *supra* note 1, at 289, 302. In *R.J. Reynolds Tobacco Co. v. Loew's Theatres, Inc.*, 511 F. Supp. 867, 875 (S.D.N.Y. 1980), the court recognized the biased structure of a survey which disclosed the tar content of the cigarettes being compared before questioning respondents about their cigarette preferences. Not surprisingly, respondents expressed a preference for the lower tar product. See also *E. & J. Gallo Winery v. Pasatiempos Gallo, S.A.*, 905 F. Supp. 1403, 1409–10 (E.D. Cal. 1994) (court recognized that earlier questions referring to playing cards, board or table games, or party supplies, such as confetti, increased the likelihood that respondents would include these items in answers to the questions that followed).

the questions go from the general (e.g., “What do you recall being discussed in the advertisement?”) to the specific (e.g., “Based on your reading of the advertisement, what companies do you think the ad is referring to when it talks about rental trucks that average five miles per gallon?”).<sup>100</sup>

The mode of questioning can influence the form that an order effect takes. In mail surveys, respondents are more likely to select the first choice offered (a primacy effect); in telephone surveys, respondents are more likely to choose the last choice offered (a recency effect). Although these effects are typically small, no general formula is available that can adjust values to correct for order effects, because the size and even the direction of the order effects may depend on the nature of the question being asked and the choices being offered. Moreover, it may be unclear which order is most appropriate. For example, if the respondent is asked to choose between two different products, and there is a tendency for respondents to choose the first product mentioned,<sup>101</sup> which order of presentation will produce the more accurate response?<sup>102</sup>

To control for order effects, the order of the questions and the order of the response choices in a survey should be rotated,<sup>103</sup> so that, for example, one-third of the respondents have Product A listed first, one-third of the respondents have Product B listed first, and one-third of the respondents have Product C listed first. If the three different orders<sup>104</sup> are distributed randomly among respondents, no response alternative will have an inflated chance of being selected because of its position, and the average of the three will provide a reasonable estimate of response level.<sup>105</sup>

100. This question was accepted by the court in *U-Haul International, Inc. v. Jartran, Inc.*, 522 F. Supp. 1238, 1249 (D. Ariz. 1981), *aff'd*, 681 F.2d 1159 (9th Cir. 1982).

101. Similarly, candidates in the first position on the ballot tend to attract extra votes when the candidates are not well known. Henry M. Bain & Donald S. Hecock, *Ballot Position and Voter's Choice: The Arrangement of Names on the Ballot and Its Effect on the Voter* (1973).

102. See *Rust Env't & Infrastructure, Inc. v. Teunissen*, 131 F.3d 1210, 1218 (7th Cir. 1997) (survey did not pass muster in part because of failure to incorporate random rotation of corporate names that were the subject of a trademark dispute).

103. See, e.g., *Stouffer Foods Corp.*, 118 F.T.C. 746, No. 9250, 1994 FTC LEXIS 196, at \*24–25 (Sept. 26, 1994); cf. *Winning Ways, Inc. v. Holloway Sportswear, Inc.*, 913 F. Supp. 1454, 1465–67 (D. Kan. 1996) (failure to rotate the order in which the jackets were shown to the consumers led to reduced weight for the survey).

104. Actually, there are six possible orders of the three alternatives: ABC, ACB, BAC, BCA, CAB, and CBA. Thus, the optimal survey design would allocate equal numbers of respondents to each of the six possible orders.

105. Although rotation is desirable, many surveys are conducted with no attention to this potential bias. Since it is impossible to know in the abstract whether a particular question suffers much, little, or not at all from an order bias, lack of rotation should not preclude reliance on the answer to the question, but it should reduce the weight given to that answer.

*F. If the Survey Was Designed to Test a Causal Proposition, Did the Survey Include an Appropriate Control Group or Question?*

Most surveys that are designed to provide evidence of trademark infringement or deceptive advertising are not conducted to describe consumer beliefs. Instead, they are intended to show how a trademark or the content of a commercial influences respondents' perceptions or understanding of a product or commercial. Thus, the question is whether the commercial misleads the consumer into thinking that Product A is a superior pain reliever, not whether consumers hold inaccurate beliefs about the product. Yet if consumers already believe, before viewing the commercial, that Product A is a superior pain reliever, a survey that records consumers' impressions after they view the commercial may reflect those preexisting beliefs rather than impressions produced by the commercial.

Surveys that record consumer impressions have a limited ability to answer questions about the origins of those impressions. The difficulty is that the consumer's response to any question on the survey may be the result of information or misinformation from sources other than the trademark the respondent is being shown or the commercial he or she has just watched. In a trademark survey attempting to show secondary meaning, for example, respondents were shown a picture of the stripes used on Mennen stick deodorant and asked, "[W]hich [brand] would you say uses these stripes on their package?"<sup>106</sup> The court recognized that the high percentage of respondents selecting "Mennen" from an array of brand names may have represented "merely a playback of brand share"<sup>107</sup>; that is, respondents asked to give a brand name may guess the one that is most familiar, generally the brand with the largest market share.<sup>108</sup>

Some surveys attempt to reduce the impact of preexisting impressions on respondents' answers by instructing respondents to focus solely on the stimulus as a basis for their answers. Thus, the survey includes a preface (e.g., "based on the commercial you just saw") or directs the respondent's attention to the mark at issue (e.g., "these stripes on the package"). Such efforts are likely to be only partially successful. It is often difficult for respondents to identify accurately the source of their impressions.<sup>109</sup> The more routine the idea being examined in the survey (e.g., that the advertised pain reliever is more effective than others on the

106. *Mennen Co. v. Gillette Co.*, 565 F. Supp. 648, 652 (S.D.N.Y. 1983), *aff'd*, 742 F.2d 1437 (2d Cir. 1984). To demonstrate secondary meaning, "the [c]ourt must determine whether the mark has been so associated in the mind of consumers with the entity that it identifies that the goods sold by that entity are distinguished by the mark or symbol from goods sold by others." *Id.*

107. *Id.*

108. See also *Upjohn Co. v. American Home Prods. Corp.*, No. 1-95-CV-237, 1996 U.S. Dist. LEXIS 8049, at \*42-44 (W.D. Mich. Apr. 5, 1996).

109. See Richard E. Nisbett & Timothy D. Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 *Psychol. Rev.* 231 (1977).



market; that the mark belongs to the brand with the largest market share), the more likely it is that the respondent's answer is influenced by preexisting impressions, by expectations about what commercials generally say (e.g., the product being advertised is better than its competitors), or by guessing, rather than by the actual content of the commercial message or trademark being evaluated.

It is possible to adjust many survey designs so that causal inferences about the effect of a trademark or an allegedly deceptive commercial become clear and unambiguous. By adding an appropriate control group, the survey expert can test directly the influence of the stimulus.<sup>110</sup> In the simplest version of a survey experiment, respondents are assigned randomly to one of two conditions.<sup>111</sup> For example, respondents assigned to the experimental condition view an allegedly deceptive commercial, and respondents assigned to the control condition either view a commercial that does not contain the allegedly deceptive material or do not view any commercial.<sup>112</sup> Respondents in both the experimental and control groups answer the same set of questions. The effect of the allegedly deceptive message is evaluated by comparing the responses made by the experimental group members with those of the control group members. If 40% of the respondents in the experimental group responded with the deceptive message (e.g., the advertised product has fewer calories than its competitor), whereas only 8% of the respondents in the control group gave that response, the difference between 40% and 8% (within the limits of sampling error<sup>113</sup>) can be attributed only to the allegedly deceptive commercial. Without the control group, it is not possible to determine how much of the 40% is due to respondents' preexisting beliefs or other background noise (e.g., respondents who misunderstand the question or misstate their responses). Both preexisting beliefs and other background noise should have produced similar response levels in the experimental

110. See Shari S. Diamond, *Using Psychology to Control Law: From Deceptive Advertising to Criminal Sentencing*, 13 *Law & Hum. Behav.* 239, 244–46 (1989); Shari S. Diamond & Linda Dimitropoulos, *Deception and Puffery in Advertising: Behavioral Science Implications for Regulation* (American Bar Found. Working Paper Series No. 9105, 1994); Jacob Jacoby & Constance Small, *Applied Marketing: The FDA Approach to Defining Misleading Advertising*, 39 *J. Marketing* 65, 68 (1975). For a more general discussion of the role of control groups, see David H. Kaye & David A. Freedman, *Reference Guide on Statistics*, § II.A, in this manual.

111. Random assignment should not be confused with random selection. When respondents are assigned randomly to different treatment groups (e.g., respondents in each group watch a different commercial), the procedure ensures that within the limits of sampling error the two groups of respondents will be equivalent except for the different treatments they receive. Respondents selected for a mall intercept study, and not from a probability sample, may be assigned randomly to different treatment groups. Random selection, in contrast, describes the method of selecting a sample of respondents in a probability sample. See *supra* § III.C.

112. This alternative commercial could be a “tombstone” advertisement that includes only the name of the product or a more elaborate commercial that does not include the claim at issue.

113. For a discussion of sampling error, see David H. Kaye & David A. Freedman, *Reference Guide on Statistics*, § IV, in this manual.

and control groups. In addition, if respondents who viewed the allegedly deceptive commercial respond differently than respondents who viewed the control commercial, the difference cannot be the result of a leading question, because both groups answered the same question. The ability to evaluate the effect of the wording of a particular question makes the control group design particularly useful in assessing responses to closed-ended questions,<sup>114</sup> which may encourage guessing or particular responses. Thus, the focus on the response level in a control group design is not on the absolute response level, but on the difference between the response level of the experimental group and that of the control group.

In designing a control group study, the expert should select a stimulus for the control group that shares as many characteristics with the experimental stimulus as possible, with the key exception of the characteristic whose influence is being assessed. A survey with an imperfect control group generally provides better information than a survey with no control group at all, but the choice of the specific control group requires some care and should influence the weight that the survey receives. For example, a control stimulus should not be less attractive than the experimental stimulus if the survey is designed to measure how familiar the experimental stimulus is to respondents, since attractiveness may affect perceived familiarity.<sup>115</sup> Nor should the control stimulus share with the experimental stimulus the feature whose impact is being assessed. If, for example, the control stimulus in a case of alleged trademark infringement is itself a likely source of consumer confusion, reactions to the experimental and control stimuli may not differ because both cause respondents to express the same level of confusion.<sup>116</sup>

Explicit attention to the value of control groups in trademark and deceptive-advertising litigation is a recent phenomenon, but it is becoming more common.<sup>117</sup> A LEXIS search using *Lanham Act* and *control group* revealed fourteen

114. The Federal Trade Commission has long recognized the need for some kind of control for closed-ended questions, although it has not specified the type of control that is necessary. *Stouffer Foods Corp.*, 118 F.T.C. 746, No. 9250, 1994 FTC LEXIS 196, at \*31 (Sept. 26, 1994).

115. See, e.g., *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club Ltd. Partnership*, 34 F.3d 410, 415–16 (7th Cir. 1994) (The court recognized that the name “Baltimore Horses” was less attractive for a sports team than the name “Baltimore Colts.”). See also *Reed-Union Corp. v. Turtle Wax, Inc.*, 77 F.3d 909, 912 (7th Cir. 1996) (court noted that one expert’s choice of a control brand with a well-known corporate source was less appropriate than the opposing expert’s choice of a control brand whose name did not indicate a specific corporate source).

116. See, e.g., *Western Publ’g Co. v. Publications Int’l, Ltd.*, No. 94-C-6803, 1995 U.S. Dist. LEXIS 5917, at \*45 (N.D. Ill. May 2, 1995) (court noted that the control product was “arguably more infringing than” the defendant’s product) (emphasis omitted).

117. See, e.g., *American Home Prods. Corp. v. Procter & Gamble Co.*, 871 F. Supp. 739, 749 (D.N.J. 1994) (discounting survey results based on failure to control for participants’ preconceived notions); *ConAgra, Inc. v. Geo. A. Hormel & Co.*, 784 F. Supp. 700, 728 (D. Neb. 1992) (“Since no control was used, the . . . study, standing alone, must be significantly discounted.”), *aff’d*, 990 F.2d 368 (8th Cir. 1993).

district court cases in the six years since the first edition of this manual in 1994,<sup>118</sup> five district court cases in the seven years from 1987 to 1993,<sup>119</sup> and only one case before 1987<sup>120</sup> in which surveys with control groups were discussed. Other cases, however, have described or considered surveys using control group designs without labeling the comparison group a control group.<sup>121</sup> Indeed, one reason why cases involving surveys with control groups may be underrepresented in reported cases is that a survey with a control group produces less ambiguous findings, which may lead to a resolution before a preliminary injunction hearing or trial occurs.<sup>122</sup>

Another more common use of control methodology is a control question. Rather than administering a control stimulus to a separate group of respondents,

118. National Football League Properties, Inc. v. Prostyle, Inc., 57 F. Supp. 2d 665 (E.D. Wis. 1999); Nabisco, Inc. v. PF Brands, Inc., 50 F. Supp. 2d 188 (S.D.N.Y. 1999); Proctor & Gamble Co. v. Colgate-Palmolive Co., No. 96 Civ. 9123, 1998 U.S. Dist. LEXIS 17773 (S.D.N.Y. Nov. 5, 1998); Mattel, Inc. v. MCA Records, Inc., 28 F. Supp. 2d 1120 (C.D. Cal. 1998); Westchester Media Co. v. PRL USA Holdings, No. H-97-3278, 1998 U.S. Dist. LEXIS 11737 (S.D. Tex. July 2, 1998); Time Inc. v. Petersen Publ'g Co., 976 F. Supp. 263 (S.D.N.Y. 1997), *aff'd*, 173 F.3d 113 (2d Cir. 1999); Adjusters Int'l, Inc. v. Public Adjusters Int'l, Inc., No. 92-CV-1426, 1996 U.S. Dist. LEXIS 12604 (N.D.N.Y. Aug. 27, 1996); Upjohn Co. v. American Home Prods. Corp., No. 1-95-CV-237, 1996 U.S. Dist. LEXIS 8049 (W.D. Mich. Apr. 5, 1996); Copy Cop, Inc. v. Task Printing, Inc., 908 F. Supp. 37 (D. Mass. 1995); Volkswagen Aktiengesellschaft v. Uptown Motors, No. 91-CIV-3447, 1995 U.S. Dist. LEXIS 13869 (S.D.N.Y. July 13, 1995); Western Publ'g Co. v. Publications Int'l, Ltd., No. 94-C-6803, 1995 U.S. Dist. LEXIS 5917 (N.D. Ill. May 2, 1995); Dogloo, Inc. v. Doskocil Mfg. Co., 893 F. Supp. 911 (C.D. Cal. 1995); Reed-Union Corp. v. Turtle Wax, Inc., 869 F. Supp. 1304 (N.D. Ill. 1994), *aff'd*, 77 F.3d 909 (7th Cir. 1996); Pfizer, Inc. v. Miles, Inc., 868 F. Supp. 437 (D. Conn. 1994).

119. ConAgra, Inc. v. Geo. A. Hormel & Co., 784 F. Supp. 700 (D. Neb. 1992), *aff'd*, 990 F.2d 368 (8th Cir. 1993); Johnson & Johnson-Merck Consumer Pharms. Co. v. Smithkline Beecham Corp., No. 91 Civ. 0960, 1991 U.S. Dist. LEXIS 13689 (S.D.N.Y. Sept. 30, 1991), *aff'd*, 960 F.2d 294 (2d Cir. 1992); Goya Foods, Inc. v. Condal Distribs., Inc., 732 F. Supp. 453 (S.D.N.Y. 1990); Sturm, Ruger & Co. v. Arcadia Mach. & Tool, Inc., No. 85-8459, 1988 U.S. Dist. LEXIS 16451 (C.D. Cal. Nov. 7, 1988); Frisch's Restaurant, Inc. v. Elby's Big Boy, Inc., 661 F. Supp. 971 (S.D. Ohio 1987), *aff'd*, 849 F.2d 1012 (6th Cir. 1988).

120. American Basketball Ass'n v. AMF Voit, Inc., 358 F. Supp. 981 (S.D.N.Y.), *aff'd*, 487 F.2d 1393 (2d Cir. 1973).

121. Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club Ltd. Partnership, No. 94-727-C, 1994 U.S. Dist. LEXIS 19277, at \*10-11 (S.D. Ind. June 27, 1994), *aff'd*, 34 F.3d 410 (7th Cir. 1994). In *Indianapolis Colts*, the district court described a survey conducted by the plaintiff's expert in which half of the interviewees were shown a shirt with the name "Baltimore CFL Colts" on it and half were shown a shirt on which the word "Horses" had been substituted for the word "Colts." *Id.* The court noted that the comparison of reactions to the horse and colt versions of the shirt made it possible "to determine the impact from the use of the word 'Colts.'" *Id.* at \*11. See also *Quality Inns Int'l, Inc. v. McDonald's Corp.*, 695 F. Supp. 198, 218 (D. Md. 1988) (survey revealed confusion between McDonald's and McSleep, but control survey revealed no confusion between McDonald's and McTavish).

122. The relatively infrequent mention of control groups in surveys discussed in federal cases is not confined to Lanham Act litigation. A LEXIS search using *survey* and *control group* revealed thirty district court cases in the six years from 1994 in which *control group* was used to refer to a methodological feature: the fourteen Lanham Act cases cited *supra* note 118; nine that referred to medical, physiological, or pharmacological experiments; and seven others.

the survey asks all respondents one or more control questions along with the question about the product or service. In a trademark dispute, for example, a survey indicated that 7.2% of respondents believed that “The Mart” and “K-Mart” were owned by the same individuals. The court found no likelihood of confusion based on survey evidence that 5.7% of the respondents also thought that “The Mart” and “King’s Department Store” were owned by the same source.<sup>123</sup>

Similarly, a standard technique used to evaluate whether a brand name is generic is to present survey respondents with a series of product or service names and ask them to indicate in each instance whether they believe the name is a brand name or a common name. By showing that 68% of respondents considered Teflon a brand name (a proportion similar to the 75% of respondents who recognized the acknowledged trademark Jell-O as a brand name, and markedly different from the 13% who thought aspirin was a brand name), the makers of Teflon retained their trademark.<sup>124</sup>

Every measure of opinion or belief in a survey reflects some degree of error. Control groups and control questions are the most reliable means for assessing response levels against the baseline level of error associated with a particular question.

### *G. What Limitations Are Associated with the Mode of Data Collection Used in the Survey?*

Three primary methods are used to collect survey data: (1) in-person interviews, (2) telephone surveys, and (3) mail surveys.<sup>125</sup> The choice of a data collection method for a survey should be justified by its strengths and weaknesses.

#### *1. In-person interviews*

Although costly, in-person interviews generally are the preferred method of data collection, especially when visual materials must be shown to the respondent under controlled conditions.<sup>126</sup> When the questions are complex and the interviewers are skilled, in-person interviewing provides the maximum oppor-

123. *S.S. Kresge Co. v. United Factory Outlet, Inc.*, 598 F.2d 694, 697 (1st Cir. 1979). Note that the aggregate percentages reported here do not reveal how many of the same respondents were confused by both names, an issue that may be relevant in some situations. See Joseph L. Gastwirth, *Reference Guide on Survey Research*, 36 *Jurimetrics J.* 181, 187–88 (1996) (review essay).

124. *E.I. DuPont de Nemours & Co. v. Yoshida Int’l, Inc.*, 393 F. Supp. 502, 526–27 & n.54 (E.D.N.Y. 1975).

125. Methods also may be combined, as when the telephone is used to “screen” for eligible respondents, who then are invited to participate in an in-person interview.

126. A mail survey also can include limited visual materials but cannot exercise control over when and how the respondent views them.

tunity to clarify or probe. Unlike a mail survey, both in-person and telephone interviews have the capability to implement complex skip sequences (in which the respondent's answer determines which question will be asked next) and the power to control the order in which the respondent answers the questions. As described in section V.A, appropriate interviewer training is necessary if these potential benefits are to be realized. Objections to the use of in-person interviews arise primarily from their high cost or, on occasion, from evidence of inept or biased interviewers.

## 2. Telephone surveys

Telephone surveys offer a comparatively fast and low-cost alternative to in-person surveys and are particularly useful when the population is large and geographically dispersed. Telephone interviews (unless supplemented with mailed materials) can be used only when it is unnecessary to show the respondent any visual materials. Thus, an attorney may present the results of a telephone survey of jury-eligible citizens in a motion for a change of venue in order to provide evidence that community prejudice raises a reasonable suspicion of potential jury bias.<sup>127</sup> Similarly, potential confusion between a restaurant called McBagel's and the McDonald's fast-food chain was established in a telephone survey. Over objections from defendant McBagel's that the survey did not show respondents the defendant's print advertisements, the court found likelihood of confusion based on the survey, noting that "by soliciting audio responses [, the telephone survey] was closely related to the radio advertising involved in the case."<sup>128</sup> In contrast, when words are not sufficient because, for example, the survey is assessing reactions to the trade dress or packaging of a product that is alleged to promote confusion, a telephone survey alone does not offer a suitable vehicle for questioning respondents.<sup>129</sup>

In evaluating the sampling used in a telephone survey, the trier of fact should consider

- (when prospective respondents are not business personnel) whether some form of random-digit dialing<sup>130</sup> was used instead of or to supplement tele-

127. *United States v. Partin*, 320 F. Supp. 275, 279-80 (E.D. La. 1970). For a discussion of surveys used in motions for change of venue, see Neal Miller, *Facts, Expert Facts, and Statistics: Descriptive and Experimental Research Methods in Litigation, Part II*, 40 Rutgers L. Rev. 467, 470-74 (1988); National Jury Project, *Jurywork: Systematic Techniques* (Elissa Krauss & Beth Bonora eds., 2d ed. 1983).

128. *McDonald's Corp. v. McBagel's, Inc.*, 649 F. Supp. 1268, 1278 (S.D.N.Y. 1986).

129. *Thompson Med. Co. v. Pfizer Inc.*, 753 F.2d 208 (2d Cir. 1985); *Incorporated Publ'g Corp. v. Manhattan Magazine, Inc.*, 616 F. Supp. 370 (S.D.N.Y. 1985), *aff'd without op.*, 788 F.2d 3 (2d Cir. 1986).

130. Random digit dialing provides coverage of households with both listed and unlisted telephone numbers by generating numbers at random from the frame of all possible telephone numbers. James M. Lepkowski, *Telephone Sampling Methods in the United States*, in *Telephone Survey Methodology* 81-91 (Robert M. Groves et al. eds., 1988).

phone numbers obtained from telephone directories, because up to 65% of all residential telephone numbers in some areas may be unlisted;<sup>131</sup>

- whether the sampling procedures required the interviewer to sample within the household or business, instead of allowing the interviewer to administer the survey to any qualified individual who answered the telephone;<sup>132</sup> and
- whether interviewers were required to call back at several different times of the day and on different days to increase the likelihood of contacting individuals or businesses with different schedules.

Telephone surveys that do not include these procedures may, like other nonprobability sampling approaches, be adequate for providing rough approximations. The vulnerability of the survey depends on the information being gathered. More elaborate procedures for achieving a representative sample of respondents are advisable if the survey instrument requests information that is likely to differ for individuals with listed telephone numbers and individuals with unlisted telephone numbers, or individuals rarely at home and those usually at home.

The report submitted by a survey expert who conducts a telephone survey should specify

1. the procedures that were used to identify potential respondents;
2. the number of telephone numbers for which no contact was made; and
3. the number of contacted potential respondents who refused to participate in the survey.

Computer-assisted telephone interviewing, or CATI, is increasingly used in the administration and data entry of large-scale surveys.<sup>133</sup> A computer protocol may be used to generate telephone numbers and dial them as well as to guide the interviewer. The interviewer conducting a computer-assisted interview (CAI), whether by telephone or in a face-to-face setting, follows the script for the interview generated by the computer program and types in the respondent's answers as the interview proceeds. A primary advantage of CATI and other CAI procedures is that skip patterns can be built into the program so that, for example, if the respondent is asked whether she has ever been the victim of a burglary and she says yes, the computer will generate further questions about

131. In 1992, the percentage of households with unlisted numbers reached 65% in Las Vegas and 62% in Los Angeles. Survey Sampling, Inc., *The Frame 2* (March 1993). Studies comparing listed and unlisted household characteristics show some important differences. Lepkowski, *supra* note 130, at 76.

132. This is a consideration only if the survey is sampling individuals. If the survey is seeking information on the household, more than one individual may be able to answer questions on behalf of the household.

133. William L. Nicholls II & R.M. Groves, *The Status of Computer-Assisted Telephone Interviewing*, 2 J. Official Stat. 93 (1986); Mary A. Spaeth, *CATI Facilities at Academic Research Organizations*, 21 Surv. Res. 11 (1990); William E. Saris, *Computer-Assisted Interviewing* (1991).

the burglary, but if she says no, the program will automatically skip the follow-up burglary questions. Interviewer errors in following the skip patterns are therefore avoided, making CAI procedures particularly valuable when the survey involves complex branching and skip patterns.<sup>134</sup> CAI procedures can also be used to control for order effects by having the program rotate the order in which questions or choices are presented.<sup>135</sup> CAI procedures, however, require additional planning to take advantage of the potential for improvements in data quality. When a CAI protocol is used in a survey presented in litigation, the party offering the survey should supply for inspection the computer program that was used to generate the interviews. Moreover, CAI procedures do not eliminate the need for close monitoring of interviews to ensure that interviewers are accurately reading the questions in the interview protocol and accurately entering the answers that the respondent is giving to those questions.

### 3. Mail surveys

In general, mail surveys tend to be substantially less costly than both in-person and telephone surveys.<sup>136</sup> Although response rates for mail surveys are often low, researchers have obtained 70% response rates in some general public surveys and response rates of over 90% with certain specialized populations.<sup>137</sup> Procedures that encourage high response rates include multiple mailings, highly personalized communications, prepaid return envelopes and incentives or gratuities, assurances of confidentiality, and first-class outgoing postage.<sup>138</sup>

A mail survey will not produce a high rate of return unless it begins with an accurate and up-to-date list of names and addresses for the target population. Even if the sampling frame is adequate, the sample may be unrepresentative if some individuals are more likely to respond than others. For example, if a survey targets a population that includes individuals with literacy problems, these individuals will tend to be underrepresented. Open-ended questions are generally of limited value on a mail survey because they depend entirely on the respondent to answer fully and do not provide the opportunity to probe or clarify

134. Saris, *supra* note 133, at 20, 27.

135. See, e.g., *Intel Corp. v. Advanced Micro Devices, Inc.*, 756 F. Supp. 1292, 1296–97 (N.D. Cal. 1991) (survey designed to test whether the term 386 as applied to a microprocessor was generic used a CATI protocol that tested reactions to five terms presented in rotated order).

136. Don A. Dillman, *Mail and Other Self-Administered Questionnaires*, in *Handbook of Survey Research*, *supra* note 1, at 359, 373.

137. *Id.* at 360.

138. See, e.g., Richard J. Fox et al., *Mail Survey Response Rate: A Meta-Analysis of Selected Techniques for Inducing Response*, 52 Pub. Opinion Q. 467, 482 (1988); Eleanor Singer et al., *Confidentiality Assurances and Response: A Quantitative Review of the Experimental Literature*, 59 Pub. Opinion Q. 66, 71 (1995); Kenneth D. Hopkins & Arlen R. Gullickson, *Response Rates in Survey Research: A Meta-Analysis of the Effects of Monetary Gratuities*, 61 J. Experimental Educ. 52, 54–57, 59 (1992).

unclear answers. Similarly, if eligibility to answer some questions depends on the respondent's answers to previous questions, such skip sequences may be difficult for some respondents to follow. Finally, because respondents complete mail surveys without supervision, survey personnel are unable to prevent respondents from discussing the questions and answers with others before completing the survey and to control the order in which respondents answer the questions. If it is crucial to have respondents answer questions in a particular order, a mail survey cannot be depended on to provide adequate data.<sup>139</sup>

#### 4. Internet surveys

A more recent innovation in survey technology is the Internet survey in which potential respondents are contacted and their responses are collected over the Internet. Internet surveys can substantially reduce the cost of reaching potential respondents and offer some of the advantages of in-person interviews by allowing the computer to show the respondent pictures or lists of response choices in the course of asking the respondent questions. The key limitation is that the respondents accessible over the Internet must fairly represent the relevant population whose responses the survey was designed to measure. Thus, a litigant presenting the results of a web-based survey should be prepared to provide evidence on the potential bias in sampling that the web-based survey is likely to introduce. If the target population consists of computer users, the bias may be minimal. If the target population consists of owners of television sets, significant bias is likely.

## V. Surveys Involving Interviewers

### A. *Were the Interviewers Appropriately Selected and Trained?*

A properly defined population or universe, a representative sample, and clear and precise questions can be depended on to produce trustworthy survey results only if "sound interview procedures were followed by competent interviewers."<sup>140</sup> Properly trained interviewers receive detailed written instructions on everything they are to say to respondents, any stimulus materials they are to use in the survey, and how they are to complete the interview form. These instructions should be made available to the opposing party and to the trier of fact. Thus, interviewers should be told, and the interview form on which answers are recorded should indicate, which responses, if any, are to be read to the respondent. Interviewers also should be instructed to record verbatim the respondent's

139. Dillman, *supra* note 136, at 368–70.

140. Toys "R" Us, Inc. v. Canarsie Kiddie Shop, Inc., 559 F. Supp. 1189, 1205 (E.D.N.Y. 1983).



answers, to indicate explicitly whenever they repeat a question to the respondent, and to record any statements they make to or supplementary questions they ask the respondent.

Interviewers require training to ensure that they are able to follow directions in administering the survey questions. Some training in general interviewing techniques is required for most interviews (e.g., practice in pausing to give the respondent enough time to answer and practice in resisting invitations to express the interviewer's beliefs or opinions). Although procedures vary, one treatise recommends at least five hours of training in general interviewing skills and techniques for new interviewers.<sup>141</sup>

The more complicated the survey instrument is, the more training and experience the interviewers require. Thus, if the interview includes a skip pattern (where, e.g., Questions 4–6 are asked only if the respondent says yes to Question 3, and Questions 8–10 are asked only if the respondent says no to Question 3), interviewers must be trained to follow the pattern. Similarly, if the questions require specific probes to clarify ambiguous responses, interviewers must receive instruction on when to use the probes and what to say. In some surveys, the interviewer is responsible for last-stage sampling (i.e., selecting the particular respondents to be interviewed), and training is especially crucial to avoid interviewer bias in selecting respondents who are easiest to approach or easiest to find.

Training and instruction of interviewers should include directions on the circumstances under which interviews are to take place (e.g., question only one respondent at a time out of the hearing of any other respondent). The trustworthiness of a survey is questionable if there is evidence that some interviews were conducted in a setting in which respondents were likely to have been distracted or in which others were present and could overhear. Such evidence of careless administration of the survey was one ground used by a court to reject as inadmissible a survey that purported to demonstrate consumer confusion.<sup>142</sup>

Some compromises may be accepted when surveys must be conducted swiftly. In trademark and deceptive advertising cases, the plaintiff's usual request is for a preliminary injunction, because a delay means irreparable harm. Nonetheless, careful instruction and training of interviewers who administer the survey and complete disclosure of the methods used for instruction and training are crucial elements that, if compromised, seriously undermine the trustworthiness of any survey.

141. Eve Weinberg, *Data Collection: Planning and Management*, in *Handbook of Survey Research*, *supra* note 1, at 329, 332.

142. *Toys "R" Us*, 559 F. Supp. at 1204 (some interviews apparently were conducted in a bowling alley; some interviewees waiting to be interviewed overheard the substance of the interview while they were waiting).

## B. What Did the Interviewers Know About the Survey and Its Sponsorship?

One way to protect the objectivity of survey administration is to avoid telling interviewers who is sponsoring the survey. Interviewers who know the identity of the survey's sponsor may affect results inadvertently by communicating to respondents their expectations or what they believe are the preferred responses of the survey's sponsor. To ensure objectivity in the administration of the survey, it is standard interview practice to conduct double-blind research whenever possible: both the interviewer and the respondent are blind to the sponsor of the survey and its purpose. Thus, the survey instrument should provide no explicit clues (e.g., a sponsor's letterhead appearing on the survey) and no implicit clues (e.g., reversing the usual order of the yes and no response boxes on the interviewer's form next to a crucial question, thereby potentially increasing the likelihood that *no* will be checked<sup>143</sup>) about the sponsorship of the survey or the expected responses.

Nonetheless, in some surveys (e.g., some government surveys), disclosure of the survey's sponsor to respondents (and thus to interviewers) is required. Such surveys call for an evaluation of the likely biases introduced by interviewer or respondent awareness of the survey's sponsorship. In evaluating the consequences of sponsorship awareness, it is important to consider (1) whether the sponsor has views and expectations that are apparent and (2) whether awareness is confined to the interviewers or involves the respondents. For example, if a survey concerning attitudes toward gun control is sponsored by the National Rifle Association, it is clear that responses opposing gun control are likely to be preferred. In contrast, if the survey on gun control attitudes is sponsored by the Department of Justice, the identity of the sponsor may not suggest the kind of responses the sponsor expects or would find acceptable.<sup>144</sup> When interviewers are well trained, their awareness of sponsorship may be a less serious threat than respondents' awareness. The empirical evidence for the effects of interviewers' prior expectations on respondents' answers generally reveals modest effects when the interviewers are well trained.<sup>145</sup>

143. *Centaur Communications, Ltd. v. A/S/M Communications, Inc.*, 652 F. Supp. 1105, 1111 n.3 (S.D.N.Y.) (pointing out that reversing the usual order of response choices, yes or no, to no or yes may confuse interviewers as well as introduce bias), *aff'd*, 830 F.2d 1217 (2d Cir. 1987).

144. See, e.g., Stanley Presser et al., *Survey Sponsorship, Response Rates, and Response Effects*, 73 Soc. Sci. Q. 699, 701 (1992) (different responses to a university-sponsored telephone survey and a newspaper-sponsored survey for questions concerning attitudes toward the mayoral primary, an issue on which the newspaper had taken a position).

145. See, e.g., Seymour Sudman et al., *Modest Expectations: The Effects of Interviewers' Prior Expectations on Responses*, 6 Soc. Methods & Res. 171, 181 (1977).

*C. What Procedures Were Used to Ensure and Determine That the Survey Was Administered to Minimize Error and Bias?*

Three methods are used to ensure that the survey instrument was implemented in an unbiased fashion and according to instructions. The first, monitoring the interviews as they occur, is done most easily when telephone surveys are used. A supervisor listens to a sample of interviews for each interviewer. Field settings make monitoring more difficult, but evidence that monitoring has occurred provides an additional indication that the survey has been reliably implemented.

Second, validation of interviews occurs when respondents in a sample are recontacted to ask whether the initial interviews took place and to determine whether the respondents were qualified to participate in the survey. The standard procedure for validation of in-person interviews is to telephone a random sample of about 10% to 15% of the respondents.<sup>146</sup> Some attempts to reach the respondent will be unsuccessful, and occasionally a respondent will deny that the interview took place even though it did. Because the information checked is limited to whether the interview took place and whether the respondent was qualified, this validation procedure does not determine whether the initial interview as a whole was conducted properly. Nonetheless, this standard validation technique warns interviewers that their work is being checked and can detect gross failures in the administration of the survey.

A third way to verify that the interviews were conducted properly is to compare the work done by each individual interviewer. By reviewing the interviews and individual responses recorded by each interviewer, researchers can identify any response patterns or inconsistencies for further investigation.

When a survey is conducted at the request of a party for litigation rather than in the normal course of business, a heightened standard for validation checks may be appropriate. Thus, independent validation of at least 50% of interviews by a third party rather than by the field service that conducted the interviews increases the trustworthiness of the survey results.<sup>147</sup>

146. See, e.g., *National Football League Properties, Inc. v. New Jersey Giants, Inc.*, 637 F. Supp. 507, 515 (D.N.J. 1986); *Davis v. Southern Bell Tel. & Tel. Co.*, No. 89-2839, 1994 U.S. Dist. LEXIS 13257, at \*16 (S.D. Fla. Feb. 1, 1994).

147. In *Rust Environment & Infrastructure, Inc. v. Teunissen*, 131 F.3d 1210, 1218 (7th Cir. 1997), the court criticized a survey in part because it "did not comport with accepted practice for independent validation of the results."

## VI. Data Entry and Grouping of Responses

### A. *What Was Done to Ensure That the Data Were Recorded Accurately?*

Analyzing the results of a survey requires that the data obtained on each sampled element be recorded, edited, and often coded before the results can be tabulated and processed. Procedures for data entry should include checks for completeness, checks for reliability and accuracy, and rules for resolving inconsistencies. Accurate data entry is maximized when responses are verified by duplicate entry and comparison, and when data entry personnel are unaware of the purposes of the survey.

### B. *What Was Done to Ensure That the Grouped Data Were Classified Consistently and Accurately?*

Coding of answers to open-ended questions requires a detailed set of instructions so that decision standards are clear and responses can be scored consistently and accurately. Two trained coders should independently score the same responses to check for the level of consistency in classifying responses. When the criteria used to categorize verbatim responses are controversial or allegedly inappropriate, those criteria should be sufficiently clear to reveal the source of disagreements. In all cases, the verbatim responses should be available so that they can be recoded using alternative criteria.<sup>148</sup>

148. See, e.g., *Coca-Cola Co. v. Tropicana Prods., Inc.*, 538 F. Supp. 1091, 1094–96 (S.D.N.Y.) (plaintiff's expert stated that respondents' answers to the several open-ended questions revealed that 43% of respondents thought Tropicana was portrayed as fresh squeezed; the court's own tabulation found no more than 15% believed this was true), *rev'd on other grounds*, 690 F.2d 312 (2d Cir. 1982). See also *McNeilab, Inc. v. American Home Prods. Corp.*, 501 F. Supp. 517 (S.D.N.Y. 1980); *Rock v. Zimmerman*, 959 F.2d 1237, 1253 n.9 (3d Cir. 1992) (court found that responses on a change of venue survey incorrectly categorized respondents who believed the defendant was insane as believing he was guilty); *Revlon Consumer Prods. Corp. v. Jennifer Leather Broadway, Inc.*, 858 F. Supp. 1268, 1276 (S.D.N.Y. 1994) (inconsistent scoring and subjective coding led court to find survey so unreliable that it was entitled to no weight), *aff'd*, 57 F.3d 1062 (2d Cir. 1995).

## VII. Disclosure and Reporting

### A. When Was Information About the Survey Methodology and Results Disclosed?

Objections to the definition of the relevant population, the method of selecting the sample, and the wording of questions generally are raised for the first time when the results of the survey are presented. By that time it is too late to correct methodological deficiencies that could have been addressed in the planning stages of the survey. The plaintiff in a trademark case<sup>149</sup> submitted a set of proposed survey questions to the trial judge, who ruled that the survey results would be admissible at trial while reserving the question of the weight the evidence would be given.<sup>150</sup> The court of appeals called this approach a commendable procedure and suggested that it would have been even more desirable if the parties had "attempt[ed] in good faith to agree upon the questions to be in such a survey."<sup>151</sup>

The *Manual for Complex Litigation, Second*, recommended that parties be required, "before conducting any poll, to provide other parties with an outline of the proposed form and methodology, including the particular questions that will be asked, the introductory statements or instructions that will be given, and other controls to be used in the interrogation process."<sup>152</sup> The parties then were encouraged to attempt to resolve any methodological disagreements before the survey was conducted.<sup>153</sup> Although this passage in the second edition of the manual has been cited with apparent approval,<sup>154</sup> the prior agreement the manual recommends has occurred rarely and the *Manual for Complex Litigation, Third*, recommends, but does not advocate requiring, prior disclosure and discussion of survey plans.<sup>155</sup>

Rule 26 of the Federal Rules of Civil Procedure requires extensive disclosure of the basis of opinions offered by testifying experts. However, these provisions may not produce disclosure of all survey materials, because parties are not obli-

149. *Union Carbide Corp. v. Ever-Ready, Inc.*, 392 F. Supp. 280 (N.D. Ill. 1975), *rev'd*, 531 F.2d 366 (7th Cir.), *cert. denied*, 429 U.S. 830 (1976).

150. Before trial, the presiding judge was appointed to the court of appeals, so the case was tried by another district court judge.

151. *Union Carbide*, 531 F.2d at 386. More recently, the Seventh Circuit recommended the filing of a motion *in limine*, asking the district court to determine the admissibility of a survey based on an examination of the survey questions and the results of a preliminary survey before the party undertakes the expense of conducting the actual survey. *Piper Aircraft Corp. v. Wag-Aero, Inc.*, 741 F.2d 925, 929 (7th Cir. 1984).

152. MCL 2d, *supra* note 15, § 21.484.

153. *Id.*

154. *E.g.*, *National Football League Properties, Inc. v. New Jersey Giants, Inc.*, 637 F. Supp. 507, 514 n.3 (D.N.J. 1986).

155. MCL 3d, *supra* note 15, § 21.493.

gated to disclose information about nontestifying experts. Parties considering whether to commission or use a survey for litigation are not obligated to present a survey that produces unfavorable results. Prior disclosure of a proposed survey instrument places the party that ultimately would prefer not to present the survey in the position of presenting damaging results or leaving the impression that the results are not being presented because they were unfavorable. Anticipating such a situation, parties do not decide whether an expert will testify until after the results of the survey are available.

Nonetheless, courts are in a position to encourage early disclosure and discussion even if they do not lead to agreement between the parties. In *McNeilab, Inc. v. American Home Products Corp.*,<sup>156</sup> Judge William C. Conner encouraged the parties to submit their survey plans for court approval to ensure their evidentiary value; the plaintiff did so and altered its research plan based on Judge Conner's recommendations. Parties can anticipate that changes consistent with a judicial suggestion are likely to increase the weight given to, or at least the prospects of admissibility of, the survey.<sup>157</sup>

### *B. Does the Survey Report Include Complete and Detailed Information on All Relevant Characteristics?*

The completeness of the survey report is one indicator of the trustworthiness of the survey and the professionalism of the expert who is presenting the results of the survey. A survey report generally should provide in detail

1. the purpose of the survey;
2. a definition of the target population and a description of the population that was actually sampled;
3. a description of the sample design, including the method of selecting respondents, the method of interview, the number of callbacks, respondent eligibility or screening criteria, and other pertinent information;
4. a description of the results of sample implementation, including (a) the number of potential respondents contacted, (b) the number not reached, (c) the number of refusals, (d) the number of incomplete interviews or terminations, (e) the number of noneligibles, and (f) the number of completed interviews;
5. the exact wording of the questions used, including a copy of each version of the actual questionnaire, interviewer instructions, and visual exhibits;
6. a description of any special scoring (e.g., grouping of verbatim responses into broader categories);

156. 848 F.2d 34, 36 (2d Cir. 1988) (discussing with approval the actions of the district court).

157. Larry C. Jones, *Developing and Using Survey Evidence in Trademark Litigation*, 19 Memphis St. U. L. Rev. 471, 481 (1989).

7. estimates of the sampling error, where appropriate (i.e., in probability samples);
8. statistical tables clearly labeled and identified as to source of data, including the number of raw cases forming the base for each table, row, or column; and
9. copies of interviewer instructions, validation results, and code books.<sup>158</sup>

A description of the procedures and results of pilot testing is not included on this list. Survey professionals generally do not describe pilot testing in their reports. The Federal Rules of Civil Procedure, however, may require that a testifying expert disclose pilot work that serves as a basis for the expert's opinion. The situation is more complicated when a nontestifying expert conducts the pilot work and the testifying expert learns about the pilot testing only indirectly through the attorney's advice about the relevant issues in the case. Some commentators suggest that attorneys are obligated to disclose such pilot work.<sup>159</sup>

### *C. In Surveys of Individuals, What Measures Were Taken to Protect the Identities of Individual Respondents?*

The respondents questioned in a survey generally do not testify in legal proceedings and are unavailable for cross-examination. Indeed, one of the advantages of a survey is that it avoids a repetitious and unrepresentative parade of witnesses. To verify that interviews occurred with qualified respondents, standard survey practice includes validation procedures,<sup>160</sup> the results of which should be included in the survey report.

Conflicts may arise when an opposing party asks for survey respondents' names and addresses in order to reinterview some respondents. The party introducing the survey or the survey organization that conducted the research generally resists supplying such information.<sup>161</sup> Professional surveyors as a rule guarantee

158. These criteria were adapted from the Council of Am. Survey Res. Orgs., *supra* note 41, § III. B. Failure to supply this information substantially impairs a court's ability to evaluate a survey. *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 532 (D.N.J. 1997) (citing the first edition of this manual). *But see Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 626–28 (1995), in which a majority of the Supreme Court relied on a summary of results prepared by the Florida Bar from a consumer survey purporting to show consumer objections to attorney solicitation by mail. In a strong dissent, Justice Kennedy, joined by three of his colleagues, found the survey inadequate based on the document available to the court, pointing out that the summary included “no actual surveys, few indications of sample size or selection procedures, no explanations of methodology, and no discussion of excluded results . . . no description of the statistical universe or scientific framework that permits any productive use of the information the so-called Summary of Record contains.” *Id.* at 640.

159. Yvonne C. Schroeder, *Pretesting Survey Questions*, 11 Am. J. Trial Advoc. 195, 197–201 (1987).

160. *See supra* § V.C.

161. *See, e.g., Alpo Petfoods, Inc. v. Ralston Purina Co.*, 720 F. Supp. 194 (D.D.C. 1989), *aff'd in part & vacated in part*, 913 F.2d 958 (D.C. Cir. 1990).

confidentiality in an effort to increase participation rates and to encourage candid responses. Because failure to extend confidentiality may bias both the willingness of potential respondents to participate in a survey and their responses, the professional standards for survey researchers generally prohibit disclosure of respondents' identities. "The use of survey results in a legal proceeding does not relieve the Survey Research Organization of its ethical obligation to maintain in confidence all Respondent-identifiable information or lessen the importance of Respondent anonymity."<sup>162</sup> Although no surveyor–respondent privilege currently is recognized, the need for surveys and the availability of other means to examine and ensure their trustworthiness argue for deference to legitimate claims for confidentiality in order to avoid seriously compromising the ability of surveys to produce accurate information.<sup>163</sup>

Copies of all questionnaires should be made available upon request so that the opposing party has an opportunity to evaluate the raw data. All identifying information, such as the respondent's name, address, and telephone number, should be removed to ensure respondent confidentiality.

162. Council of Am. Survey Res. Orgs., *supra* note 41, § I.A.3.f. Similar provisions are contained in the By-Laws of the American Association for Public Opinion Research.

163. Litton Indus., Inc., No. 9123, 1979 FTC LEXIS 311, at \*13 & n.12 (June 19, 1979) (Order Concerning the Identification of Individual Survey-Respondents with Their Questionnaires) (citing Frederick H. Boness & John F. Cordes, Note, *The Researcher-Subject Relationship: The Need for Protection and a Model Statute*, 62 Geo. L.J. 243, 253 (1973)). See also *Lampshire v. Procter & Gamble Co.*, 94 F.R.D. 58, 60 (N.D. Ga. 1982) (defendant denied access to personal identifying information about women involved in studies by the Centers for Disease Control based on Fed. R. Civ. P. 26(c) giving court the authority to enter "any order which justice requires to protect a party or persons from annoyance, embarrassment, oppression, or undue burden or expense.") (citation omitted).



## Glossary of Terms

The following terms and definitions were adapted from a variety of sources, including Handbook of Survey Research (Peter H. Rossi et al. eds., 1983); 1 Environmental Protection Agency, Survey Management Handbook (1983); Measurement Errors in Surveys (Paul P. Biemer et al. eds., 1991); William E. Saris, Computer-Assisted Interviewing (1991); Seymour Sudman, Applied Sampling (1976).

**branching.** A questionnaire structure that uses the answers to earlier questions to determine which set of additional questions should be asked (e.g., citizens who report having served as jurors on a criminal case are asked different questions about their experiences than citizens who report having served as jurors on a civil case).

**CAI (computer-assisted interviewing).** A method of conducting interviews in which an interviewer asks questions and records the respondent's answer by following a computer-generated protocol.

**CATI (computer-assisted telephone interviewing).** A method of conducting telephone interviews in which an interviewer asks questions and records the respondent's answer by following a computer-generated protocol.

**closed-ended question.** A question that provides the respondent with a list of choices and asks the respondent to choose from among them.

**cluster sampling.** A sampling technique allowing for the selection of sample elements in groups or clusters, rather than on an individual basis; it may significantly reduce field costs and may increase sampling error if elements in the same cluster are more similar to one another than are elements in different clusters.

**confidence interval.** An indication of the probable range of error associated with a sample value obtained from a probability sample. Also, margin of error.

**convenience sample.** A sample of elements selected because they were readily available.

**double-blind research.** Research in which the respondent and the interviewer are not given information that will alert them to the anticipated or preferred pattern of response.

**error score.** The degree of measurement error in an observed score (see true score).

**full-filter question.** A question asked of respondents to screen out those who do not have an opinion on the issue under investigation before asking them the question proper.

**mall intercept survey.** A survey conducted in a mall or shopping center in which potential respondents are approached by a recruiter (intercepted) and invited to participate in the survey.

**multistage sampling design.** A sampling design in which sampling takes place in several stages, beginning with larger units (e.g., cities) and then proceeding with smaller units (e.g., households or individuals within these units).

**nonprobability sample.** Any sample that does not qualify as a probability sample.

**open-ended question.** A question that requires the respondent to formulate his or her own response.

**order effect.** A tendency of respondents to choose an item based in part on the order in which it appears in the question, questionnaire, or interview (see primacy effect and recency effect); also referred to as a context effect because the context of the question influences the way the respondent perceives and answers it.

**parameter.** A summary measure of a characteristic of a population (e.g., average age, proportion of households in an area owning a computer). Statistics are estimates of parameters.

**pilot test.** A small field test replicating the field procedures planned for the full-scale survey; although the terms *pilot test* and *pretest* are sometimes used interchangeably, a pretest tests the questionnaire, whereas a pilot test generally tests proposed collection procedures as well.

**population.** The totality of elements (objects, individuals, or other social units) that have some common property of interest; the target population is the collection of elements that the researcher would like to study; the survey population is the population that is actually sampled and for which data may be obtained. Also, universe.

**population value, population parameter.** The actual value of some characteristic in the population (e.g., the average age); the population value is estimated by taking a random sample from the population and computing the corresponding sample value.

**pretest.** A small preliminary test of a survey questionnaire. See pilot test.

**primacy effect.** A tendency of respondents to choose early items from a list of choices; the opposite of a recency effect.

**probability sample.** A type of sample selected so that every element in the population has a known nonzero probability of being included in the sample; a simple random sample is a probability sample.

**probe.** A follow-up question that an interviewer asks to obtain a more complete answer from a respondent (e.g., "Anything else?" "What kind of medical problem do you mean?").

- quasi-filter question.** A question that offers a “don’t know” or “no opinion” option to respondents as part of a set of response alternatives; used to screen out respondents who may not have an opinion on the issue under investigation.
- random sample.** See simple random sample.
- recency effect.** A tendency of respondents to choose later items from a list of choices; the opposite of a primacy effect.
- sample.** A subset of a population or universe selected so as to yield information about the population as a whole.
- sampling error.** The estimated size of the difference between the result obtained from a sample study and the result that would be obtained by attempting a complete study of all units in the sampling frame from which the sample was selected in the same manner and with the same care.
- sampling frame.** The source or sources from which the objects, individuals, or other social units in a sample are drawn.
- secondary meaning.** A descriptive term that becomes protectable as a trademark if it signifies to the purchasing public that the product comes from a single producer or source.
- simple random sample.** The most basic type of probability sample; each unit in the population has an equal probability of being in the sample, and all possible samples of a given size are equally likely to be selected.
- skip pattern, skip sequence.** A sequence of questions in which some should not be asked (should be skipped) based on the respondent’s answer to a previous question (e.g., if the respondent indicates that he does not own a car, he should not be asked what brand of car he owns).
- stratified sampling.** A sampling technique that permits the researcher to subdivide the population into mutually exclusive and exhaustive subpopulations, or strata; within these strata, separate samples are selected; results can be combined to form overall population estimates or used to report separate within-stratum estimates.
- survey population.** See population.
- systematic sampling.** A sampling technique that consists of a random starting point and the selection of every *n*th member of the population; it generally produces the same results as simple random sampling.
- target population.** See population.
- trade dress.** A distinctive and nonfunctional design of a package or product protected under state unfair competition law and the federal Lanham Act §43(a), 15 U.S.C. §1125(a) (1946) (amended 1992).

**true score.** The underlying true value, which is unobservable because there is always some error in measurement; the observed score = true score + error score.

**universe.** See population.

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